Supreme Court, U.S.
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No. 98-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, *et al.*
Petitioners,

v.

CSX TRANSPORTATION, INCORPORATED; *et al.*
Respondents.

Appeal from the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Ex parte Young exception to the Eleventh Amendment give a federal court the power to enjoin a State from collecting taxes from a railroad company where there is an adequate remedy at State law?

2. For purposes of the Ex parte Young doctrine, is a federal court awarding prospective or retroactive relief when it enjoins a State from collecting taxes that it has already assessed and as to which the State protest period has expired?

THE PARTIES

Petitioners are the West Virginia Board of Public Works and its seven constitutional members, Gaston Caperton, Governor; Larrie Bailey, State Treasurer; Glen B. Gainer, III, State Auditor; Darrell V. McGraw, Jr., Attorney General; Gus Douglass, Commissioner of Agriculture; Hank Marockie, State Superintendent of Schools; and Ken Hechler, Secretary of State.

Respondents are CSX Transportation, Inc., a Virginia corporation with its principal place of business in Jacksonville, Florida, and Nicholas, Fayette and Greenbrier Railroad Company, a West Virginia corporation with its principal place of business in Jacksonville, Florida.

The United States Department of Justice was intervenor before the Fourth Circuit Court of Appeals.

The Association of American Railroads, the American Shortline Railroad Association, the Regional Railroads of America, and the Railway Progress Institute were amici curiae in the Fourth Circuit Court of Appeals.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, GASTON CAPERTON, Governor; LARRIE BAILEY, State Treasurer; GLEN B. GAINER, III, State Auditor; DARRELL V. McGRAW, JR., Attorney General; GUS DOUGLASS, Commissioner of Agriculture; HANK MAROCKIE, State Superintendent of Schools; and KEN HECHLER, Secretary of State,

Petitioners,

v.

CSX TRANSPORTATION, INCORPORATED; NICHOLAS, FAYETTE AND GREENBRIER RAILROAD COMPANY,

Respondents.

Appeal from the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 138 F.3d 537 (4th Cir. 1998), and is reprinted in Appendix A. The ruling of the United States District Court for the Southern District of West Virginia is reported at ___ F. Supp. ___, No. Civ. A. 2:96-1905, 1998 WL 128432 (S.D. W.

Va. Feb. 25, 1998), and is reprinted in Appendix B. The decision of the Fourth Circuit denying the injunction pending appeal is unreported, and is reproduced at Appendix C. The decision of the District Court denying the Renewed Motion for Preliminary Injunction is unreported and is reproduced in Appendix D.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment reversing and remanding the decision of the United States District Court for the Southern District of West Virginia that the Defendants, the Board and its members, were immune from suit in federal court pursuant to the Eleventh Amendment. This Court has jurisdiction to review pursuant to 28 U.S.C. § 1254(1). A decision denying Eleventh Amendment immunity is final for purposes of appeal. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993).

CONSTITUTION AND STATUTES INVOLVED

The Eleventh Amendment to the U.S. Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 11501 of title 49 of the U.S. Code provides in relevant part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial

> and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> . . . .
>
> (c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law.

Section 1341 of title 28 of the U.S. Code provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Pertinent portions of the following sections of the West Virginia Constitution and Code are reprinted in Appendix E:

W. Va. Const. art. XII, § 1
W. Va. Code § 11-6-11
W. Va. Code § 11-6-12
W. Va. Code § 11-6-18
W. Va. Code § 11A-1-3
W. Va. Code § 18-9A-12

STATEMENT OF THE CASE

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act") bars States from taxing railroads at higher rates than other property.[1] Litigation under the 4-R Act is commonplace, as the railroads have not hesitated to challenge State tax assessments throughout the country. Prior to this Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), this litigation typically took place in federal court because the 4-R Act expressly provides (the Tax Injunction Act, 28 U.S.C. § 1341, notwithstanding) that federal courts have jurisdiction over such cases. The Seminole Tribe decision called into question whether the abrogation of the States' Eleventh Amendment immunity in the 4-R Act was constitutional. Rather than decide that question, the court below held that the Ex parte Young, 209 U.S. 123 (1908), doctrine provides federal courts with jurisdiction to hear railroads' claims that State assessments violated the 4-R Act. This ruling is inconsistent with a long line of Supreme Court cases holding that federal courts do not have the equitable power to enjoin State tax collection where there is an adequate remedy at State law. It also impermissibly expands the previously limited exception to Eleventh Amendment immunity embodied in Ex parte Young and its progeny. Because of the

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[1] Section 306 forbids, in pertinent part, assessing "rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property." 49 U.S.C. § 11501(b)(1). Discrimination is further defined as assessing railroads at a value which is more than five percent higher than the value of other commercial and industrial property. 49 U.S.C. § 11501(c).

importance of this issue to States' sovereignty, the frequency with which 4-R Act cases are filed, and the incentive the decision provides to taxpayers to violate State law, the West Virginia Board of Public Works ("Board") and its seven members seek this Court's review of that decision.

1. The Board is responsible for assessing ad valorem taxes on railroads and other public service corporations. In so doing, the Board considers the value of the property on December 31 of the year prior to the assessment year. For the tax year at issue in this case, the valuation date was December 31, 1994. On September 13, 1995, the tentative notice of assessment was issued to the Railroads. On November 14, 1995, the Board met to hear protests regarding the tentative assessments. The Railroads did not protest. On December 13, 1995, the Board met again to finalize the assessments. The final tax assessment for the Railroads was mailed by the Secretary of State on December 20, 1995, and the statutory lien attached on December 31, 1995. There is a period of fifteen days to allow taxpayers to protest their finalized assessment in the appropriate State court. W. Va. Code § 11-6-11. The Railroads made no protest in State court during the protest period.[2] The assessment became final in January of 1996 after the Railroads failed to protest their assessment.

In March 1996, the State Auditor certified the tax assessment of the Railroads to the counties which the counties rely on to arrive at their operating budget. A substantial amount of these ad valorem taxes are used to fund the West Virginia public school system, a duty undertaken jointly by the State and the counties. Using these ad valorem taxes, each county contributes its "local share" toward the State's public schools. See W. Va. Code § 18-9A-12. For each dollar of its local share, the county receives one less dollar from the State fisc. W. Va. Code § 18-9A-12(a). If there is a shortfall in the tax collection, the counties will claim additional State aid for their schools. W. Va. Code § 18-9A-12(b).

Under West Virginia law, ad valorem tax payments may be made in two equal payments due on September 1 and March 1.

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[2] Section 306 explicitly provides for concurrent jurisdiction to resolve 4-R Act cases meaning that the railroads may take the 4-R Act's five percent definition of discrimination into State courts. 49 U.S.C. § 11501(c).

See W. Va. Code § 11-6-18. The taxpayer is delinquent if the tax payments are not made by October 1 and April 1, respectively. W. Va. Code § 11A-1-3. For the tax year at issue here, the Railroads' tax payments were due on September 1, 1996, and March 1, 1997. Full one-half payments made on or before September 1 and March 1 receive the benefit of a two and one-half percent deduction. W. Va. Code §§ 11-6-18; 11A-1-3. The Railroads made their first one-half payment in full and without protest on August 30, 1996, and took advantage of the two and one-half percent discount.

Nearly two months after payment in full of the first one-half payment, on October 21, 1996, the Railroads filed a complaint against the Board and its members in the United States District Court for the Southern District of West Virginia alleging § 306 had been violated. The Board filed a Motion for Summary Judgment asserting Eleventh Amendment immunity based on the Supreme Court's recent decision in Seminole Tribe.

2. The District Court granted the Board's Motion for Summary Judgment and dismissed this case for lack of jurisdiction, holding that the suit must be dismissed against the Board because, after Seminole Tribe, the 4-R Act's attempted abrogation of Eleventh Amendment immunity was no longer valid. Appendix B at 6. The District Court also dismissed the suit against the individual Board members. The District Court held the Ex parte Young exception to Eleventh Amendment immunity did not apply since the primary alleged violation of federal law occurred when the assessment became final and hence the monetary relief sought by the Railroads would be retroactive. Appendix B at 15. The District Court reasoned that crafting an injunction in which monetary relief played a primary, not ancillary, role was beyond the reach of Ex parte Young. Appendix B at 16-17. The District Court denied the Railroads' Motion for a Preliminary Injunction as moot. Appendix B at 17; Appendix D.

3. On February 28, 1997, the Railroads appealed to the Fourth Circuit Court of Appeals and requested an injunction pending appeal. In seeking the injunction, the Railroads asserted that under § 306 they need only demonstrate reasonable cause to believe that § 306 had been or is about to be violated. Also, on February 28, 1997, the Railroads, without authorization or consent from the State, deducted from their final tax payment the amount

of the alleged over-payment and over-assessment for both one-half payments. The Railroads' unauthorized withholding of a portion of the March 1, 1997, payment makes the Railroads delinquent taxpayers. W. Va. Code § 11A-1-3. The Railroads' requested injunction pending appeal was denied by the Fourth Circuit on March 27, 1997. Appendix C.

On appeal, the Railroads argued, as they did below, that the abrogation of Eleventh Amendment immunity by § 306 was still valid after Seminole Tribe because § 306 could have been passed under § 5 of the Fourteenth Amendment, and, alternatively, that the Ex parte Young exception to Eleventh Amendment immunity applied enjoining the Board's members on the theory that the relief sought was prospective and injunctive. The Department of Justice intervened in the appeal taking no position as to the merits of the parties' claims but arguing that the Fourth Circuit should avoid the issue of the constitutionality of the abrogation in § 306 of the 4-R Act and hold that the Ex parte Young exception to Eleventh Amendment immunity should be applied.

After oral argument, the Fourth Circuit issued its decision reversing the District Court's dismissal of the Ex parte Young claim and refusing to resolve the question of whether the abrogation of Eleventh Amendment immunity in § 306 of the 4-R Act is still valid. In ruling on the Ex parte Young issue, the Fourth Circuit held that an injunction against collection of illegal taxes already assessed even after the first one-half payment has been paid in full is prospective. Appendix A at 9. The Fourth Circuit also held that the Railroads had not sought a refund or credit for a monetary loss because the money allegedly illegally assessed is still in the Railroads' pockets. Appendix A at 12.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S INTERPRETATION OF THE EX PARTE YOUNG EXCEPTION TO THE ELEVENTH AMENDMENT IMPERMISSIBLY EXPANDS THAT EXCEPTION THEREBY ERODING THE STATES' ELEVENTH AMENDMENT IMMUNITY.

A. The decision below conflicts with the longstanding rule that federal courts cannot enjoin a State from collecting taxes where there is an adequate remedy at State law.

West Virginia law plainly provides that taxpayers have the right to protest their finalized tax assessments in State court, and that the State courts can remedy unlawful assessments. W. Va. Code §§ 11-6-11; 11-6-12. The Railroads did not avail themselves of that State procedure. Instead, they allowed the protest period to expire and then filed suit in federal court more than nine months later. By allowing the Railroads' suit to proceed, the court below disregarded the longstanding rule that federal courts may not enjoin State tax collection--at least where there is an adequate remedy at State law.[3]

In National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582, 589 (1995) (citations omitted), this Court observed that "[o]ur cases since Dows [v. City of Chicago, 11 Wall. 108 (1871)] have uniformly concluded that federal courts cannot enjoin collection of [S]tate taxes when a remedy at law is available." This conclusion stems from the Court's "'scrupulous regard for the rightful independence of [S]tate governments,'" Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 108 (1981) (quoting Matthews v. Rodgers, 284 U.S. 521, 525 (1932)), and the recognition that it "is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments."

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[3] Throughout this litigation, the Board has contended that the Ex parte Young doctrine does not give the federal courts jurisdiction to hear this case. Although the Board focused below on its contention that the requested relief was retroactive (see Part B, infra), and not on the argument that federal courts generally lack the power to enjoin State tax collection, where there is an adequate remedy at State law, that argument is properly raised in this Court because it is jurisdictional.

National Private Truck Council, 515 U.S. at 586 (quoting Dows, 11 Wall. at 110). Thus, the Tax Injunction Act is a manifestation of this Court's recognition that taxation is the special prerogative of the States. The Tax Injunction Act is not the source of the federal courts' inability to meddle with State taxation but "may be best understood as but a partial codification of the federal reluctance to interfere with [S]tate taxation." National Private Truck Council Ass'n, 515 U.S. at 590.

The Ex parte Young doctrine does not contradict this Court's recognition that State taxation is deserving of freedom from federal interference. Indeed, many of the cases establishing that federal courts generally lack the authority to enjoin State tax collection post-date the Ex parte Young decision. See, e.g., Matthews, supra; Singer Sewing Machine Co. of New Jersey v. Benedict, 229 U.S. 481, 485 (1913); Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U.S. 276, 282 (1909). This Court's decision last Term in Idaho v. Coeur d'Alene Tribe of Idaho, __ U.S. __, 117 S. Ct. 2028 (1997), confirms the reason for the federal courts' reluctance to interfere with State taxation. Where a State interest is of unusual importance to its sovereignty (such as the ability to regulate its submerged land), a federal court may not award what is otherwise typical Ex parte Young relief, viz., enjoining a State officer from continuing to violate federal law. Id. at 2043 (Kennedy, J.); id. at 2047 (O'Connor, J., concurring). The line of cases beginning with Dows holds that State tax collection is a State interest of unusual significance, and a plaintiff's mere declaration that it seeks prospective relief against a State is simply not enough to invoke the Ex parte Young exception to the Eleventh Amendment.

The decision below, which treats tax collection as though it were a run of the mill State function, flatly contradicts that long-held understanding on the limits of federal court power. This Court should grant the petition to ensure that the States' sovereign interest in overseeing their collection of taxes is not federalized by judicial fiat.[4]

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[4] To be sure, the 4-R Act evinced Congressional intent to have federal courts enjoin State tax collection in certain cases. But the Board challenged the abrogation of their Eleventh Amendment immunity in the 4-R Act as being unconstitutional under Seminole Tribe, and the Fourth Circuit assumed that the 4-R Act's abrogation was invalid in order to reach the Ex parte Young issue. Thus,

B. The Fourth Circuit's decision expands the Ex parte Young exception to the Eleventh Amendment to include retroactive monetary relief.

Historically, the Ex parte Young exception to the Eleventh Amendment has been available only in limited circumstances, i.e., to enjoin future violations of federal or constitutional law by State officials. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). As this Court stated in Puerto Rico Aqueduct & Sewer Authority, 506 U.S. at 146, "the [Ex parte Young] exception is narrow: It applies only to prospective relief, does not permit judgments against [S]tate officers declaring that they violated federal law in the past, [Green v. Mansour, 474 U.S. 64, 73 (1985)], and has no application in suits against the States and their agencies, which are barred regardless of the relief sought, [citation omitted]." The Fourth Circuit's decision ignores the traditional limits of Ex parte Young and effectively provides *declaratory retroactive monetary* relief against the State.

The Fourth Circuit's decision provides declaratory relief in contravention of this Court's jurisprudence. The assessment of the Railroads by the Board was the dispositive act. It is the assessment that establishes the amount the taxpayer owes; collection merely requires that the taxpayer pay the amount in the finalized assessment with an option to make two equal payments.[5] The language of § 306 also makes clear that the assessment is the

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the question here is the scope of federal courts' authority in the absence of the 4-R Act's abrogation of Eleventh Amendment immunity.

[5] In In Re Columbia Gas Transmission Corp., 37 F.3d 982 (3rd Cir. 1994), cert. denied, 514 U.S. 1082 (1995), the Third Circuit Court of Appeals addressed the question of when liability for ad valorem taxes of a public service corporation, like the Railroads, accrued. The Third Circuit, interpreting West Virginia law and agreeing with the Department of Justice, held that the ad valorem tax liability for a public service corporation in West Virginia accrued on the valuation date, although the State of West Virginia and the public service corporation had taken the position that the public service corporation's ad valorem tax liability accrued after the tax assessment became final or following the attachment of the statutory lien. Here, all of these dates, the valuation date, the finalization of the assessment date and the statutory lien date had passed months before the Railroads filed suit. There was a thirteen-month lag between the receipt of the tentative assessments and the institution of litigation and a nine-month lag between the finalization of the assessment and the filing of the litigation.

dispositive action. The statute states that a State may not "levy or collect . . . on an assessment that may not be made under paragraph (1) of this subsection." 49 U.S.C. § 11501(b)(2). Thus, because of the way the statute is constructed, a court cannot enjoin the collection of a tax unless the court determines that the assessment is illegal.[6] By holding that the members of the Board could be enjoined from collecting the amount the Railroads refused to pay, the Fourth Circuit effectively held that a declaratory judgment overturning the assessment made by the Board two years earlier is available.[7] Under the Fourth Circuit's expansive interpretation of the Ex parte Young doctrine, a taxpayer may unilaterally manipulate Eleventh Amendment immunity by becoming a delinquent taxpayer. It encourages taxpayers not to pay their taxes and creates an exception to Eleventh Amendment immunity which swallows the rule.

The Fourth Circuit's decision also impermissibly expands the Ex parte Young exception to provide retroactive relief. The retroactivity of the relief with regard to the first one-half payment is obvious. The Railroads voluntarily made their first one-half payment in full two months before they filed suit. Both assessment and collection of the first one-half payment had occurred at the time the Fourth Circuit blessed the Railroads' unilateral shortchanging of their second one-half payment to recoup an amount allegedly discriminatory from their first one-half payment. This is clearly retroactive relief.[8] Because the

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[6] At the time of the passage of the 4-R Act, the issue of whether an injunction on collection of taxes was retroactive or prospective was irrelevant because abrogation under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, was not challenged.

[7] The Fourth Circuit decision points out in a footnote that the Railroads have not proven yet that the Board violated § 306 when it assessed them and the Fourth Circuit was assuming such violation arguendo. Appendix A at 12. However, for the Fourth Circuit to hold that collection, which is based on an assessment final for nine months prior to the institution of the suit, may be enjoined is to ignore the finality of the assessment, thus allowing retroactive relief in a suit brought under the Ex parte Young exception to Eleventh Amendment immunity.

[8] The Fourth Circuit used an example in an attempt to justify why an "injunction" concerning the first one-half payment was not retroactive: Suppose $10.00 in taxes had been assessed, and the first one-half payment, $5.00, had been paid. It was then discovered that the lawful amount of the tax assessment was $8.00. The Fourth Circuit noted that it could order the State to repay $1.00 and

assessment is the only dispositive action taken by the State, allowing the Railroads to shortchange the amount alleged to be discriminatory with regard to the second one-half payment is also retroactive relief. The tax assessment was made and finalized long ago and enjoining collection reaches back in time and changes that assessment.

Moreover, the primary effect of the Fourth Circuit's decision is to deplete the State's treasury. The Railroads' unilateral shortchanging of their tax bill creates a deficit for which additional claims will be made on the State in order to ensure the State meets its constitutional mandate to provide all students with a thorough and efficient education, a fundamental right. W. Va. Const. Art. XII, § 1. Thus, although termed an "injunction" by the Fourth Circuit, it is in actuality impermissible monetary relief because it operates primarily to tap the coffers of the State. Edelman v. Jordan, 415 U.S. 651, 667-68 (1974). This Court should grant certiorari to return the Ex parte Young exception to the contours historically and consistently recognized by this Court: a limited exception to enjoin prospective action by State officials in derogation of federal or constitutional law.

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enjoin the collection of another $1.00. "But why," mused the Fourth Circuit, "we would order such an unnecessarily complex and invalid injunction when a simple, valid remedy is available [enjoining collection of $2.00 from the second one-half payment] is difficult to understand." Appendix A at 13. The Fourth Circuit's example illustrates the Fourth Circuit's disregard of the laws of the State of West Virginia and principles of State sovereignty. The laws of West Virginia provide for two equal payments and failure to pay either payment fully makes the taxpayer delinquent; thereby, any repayment is clearly retroactive. This Court has long recognized "the imperative need of a State to administer its own fiscal operations." Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976).

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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June 4, 1998

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CSX TRANSPORTATION, INCORPORATED;
NICHOLAS, FAYETTE AND GREENBRIER
RAILROAD COMPANY,
Plaintiffs-Appellants,

v.

THE BOARD OF PUBLIC WORKS OF THE
STATE OF WEST VIRGINIA; GASTON
CAPERTON, III, Governor; LARRIE
BAILEY, State Treasurer; GLEN B.
GAINER, III, State Auditor; DARRELL
V. MCGRAW, JR., Attorney General; No. 97-1296
Gus DOUGLASS, Commissioner of
Agriculture; HANK MAROCKIE, State
Superintendent of Schools,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Intervenor.

ASSOCIATION OF AMERICAN RAILROADS;
AMERICAN SHORTLINE RAILROAD
ASSOCIATION; REGIONAL RAILROADS OF
AMERICA; RAILWAY PROGRESS INSTITUTE,
Amici Curiae.

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
Charles H. Haden II, Chief District Judge.
(CA-96-1905-2)
Argued: October 29, 1997
Decided: March 10, 1998

Before MURNAGHAN, NIEMEYER, and HAMILTON, Circuit Judges.

Reversed and remanded by published opinion. Judge Murnaghan wrote the opinion, in which Judge Niemeyer and Hamilton joined.

COUNSEL

ARGUED: James W. McBride, BAKER, DONELSON, BEARMAN & CALDWELL, Washington, D.C., for Appellants. Stephanie Robin Marcus, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. Katherine A. Schultz, Senior Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL, Charleston, West Virginia, for Appellees. **ON BRIEF:** Anne M. Stolee, BAKER, DONELSON, BEARMAN & CALDWELL, Washington, D.C., for Appellants. Frank W. Hunger, Assistant Attorney General, Rebecca Aline Betts, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. Darrell V. McGraw, Jr., Attorney General, Stephanie M. Sisson, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Charleston, West Virginia, for Appellees. Kenneth P. Kolson, ASSOCIATION OF AMERICAN RAILROADS, Washington, D.C.; Betty J. Christian, Shannen W. Coffin, STEPTOE & JOHNSON, L.L.P., Washington, D.C., for Amicus Curiae Association of American Railroads. Richard A. Malm, DICKINSON, MACKAMAN, TYLER & HAGEN, P.C., Des Moines, Iowa, for Amici Curiae American Short Line Railroad Association. et al.

OPINION

MURNAGHAN, Circuit Judge:

Two railroads alleged that the assessment, levying and collection of certain West Virginia taxes violated the Railroad Revitalization and Regulatory Reform Act of 1976. Finding that the Act's purported abrogation of a state's Eleventh Amendment sovereign immunity was invalid under *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), and that *Ex parte Young*, 209 U.S. 123 (1908), relief was unavailable, the district court dismissed the case for lack of subject matter jurisdiction. We reverse the dismissal of the *Ex parte Young* claim. Because an injunction against the future collection of illegal taxes could provide full relief to the plaintiffs, we do not resolve the question whether the abrogation of sovereign immunity is valid or invalid.

I.

CSX Transportation, Inc., and Nicholas, Fayette & Greenbrier Railroad Co. ("Railroads") brought this action against the Board of Public Works of the State of West Virginia ("Board") and its members to challenge ad valorem taxes imposed for the 1996 tax year. The Railroads' property was assessed on December 31, 1994. On September 13, 1995, the tentative notices of the assessments were issued to the Railroads. The Board met in December of 1995 to finalize the assessments, and when the Railroads failed to protest, the assessments became final in January of 1996.

The Railroads paid one half of their assessed taxes on August 30, 1996, in accordance with West Virginia law. However, in January of 1997, the West Virginia Department of Tax and Revenue released data concerning the level of assessment of other commercial and industrial taxpayers in

the state for the 1996 tax year. Based on this data, the Railroads concluded that their assessments violated section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. No. 94-210, 90 Stat. 54 (1976), now codified at 49 U.S.C. § 11501.[1]

The Railroads filed a motion for a preliminary injunction seeking to enjoin the Board and its members from collecting the remaining taxes assessed against them. The Railroads alleged that the Board had assessed their property at a ratio of assessed value to true market value more than five percent greater than the ratio of assessed value to true market value at which other commercial and industrial property was assessed for the 1996 tax year, in violation of section 306(1)(a) of the 4-R Act, 49 U.S.C. § 11501(b)(1) & (c).[2]

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[1] Section 306 of the 4-R Act has twice been recodified, but neither recodification was intended to make any substantive change to that section. *See Clinchfield R.R. Co. v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983) (citing H.R. Rep. No. 1395, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3009); H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 193 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 878. Because both parties in their briefs and this Circuit in prior cases have done so, we will hereinafter refer to 49 U.S.C. § 11501 as "section 306 of the 4-R Act."

[2] The statute provides, in pertinent part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

The Railroads further alleged that the Board and its members were attempting to collect tax payments from the Railroads in violation of section 306(1)(b), 49 U.S.C. § 11501(b)(2). By Order of February 25, 1997, the district court denied the motion for a preliminary injunction.

In that Order, the district court found that the purported abrogation of Eleventh Amendment sovereign immunity found in section 306 was invalid, based on the Supreme Court's recent decision in *Seminole Tribe v. Florida*. The court also found that it could not enjoin the individual members of the Board under *Ex parte Young* because the relief requested by the Railroads was retrospective. The court therefore dismissed the case for lack of jurisdiction.

The Railroads then made their second one-half payment of assessed taxes on February 28, 1997, but they unilaterally deducted from that payment the amount they alleged was discriminatory overtaxation. Now the Railroads appeal from the dismissal of their claims.

II.

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(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section.

49 U.S.C. § 11501.

The sovereign immunity embodied in the Eleventh Amendment protects an unconsenting state against suit brought by private parties in federal court. *See Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1122 (1996). The federal government may abrogate that immunity from suit, however, by a clear expression of legislative intent to abrogate enacted pursuant to a valid exercise of power. *See id.* at 1123-24. It is uncontested that section 306 of the 4-R Act clearly intended to abrogate state sovereign immunity. However, after *Seminole Tribe*, the only power which the Supreme Court has held may be used to abrogate a state's sovereign immunity is Section Five of the Fourteenth Amendment. *See id.* at 1125. The abrogation in section 306 of the 4-R Act is only effective, therefore, if it is a valid exercise of that power.

It is contested whether, in addition to exercising its Commerce Clause power, Congress intended to or could have passed section 306 of the 4-R Act pursuant to its Fourteenth Amendment enforcement power. Ignoring the wealth of precedent establishing that Congress's failure to mention that it acted pursuant to Section Five of the Fourteenth Amendment is not dispositive, *see, e.g.*, *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983); *Schlossberg v. Maryland (In re Creative Goldsmiths of Washington, D.C., Inc.)*, 119 F.3d 1140, 1147 (4th Cir. 1997) ("Because there is no evidence that Congress either passed the Bankruptcy Code under § 5 of the Fourteenth Amendment or sought to preserve the core values specifically enumerated in that amendment, we hold that Congress' effort to abrogate the states' Eleventh Amendment immunity . . . is unconstitutional and ineffective."); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997), the district court held that because the major purpose of the 4-R Act in general was to protect interstate commerce, section 306 could not be supported by the Fourteenth Amendment enforcement power.

Although remedying discriminatory taxation, in general, is an equal protection concern, the power granted to Congress

by Section Five of the Fourteenth Amendment is limited to the promulgation of remedial or preventive legislation that enforces the provisions of the Fourteenth Amendment and does not extend to substantive legislation that defines the Amendment's restrictions on the states.[3] *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997). We need not determine whether section 306 is remedial equal protection legislation or substantive legislation, however, because even assuming that section 306 cannot be justified as an exercise of Section Five of the Fourteenth Amendment and therefore its purported abrogation of state sovereign immunity is invalid, *Ex parte Young* authorizes an injunction, without eliminating sovereign immunity, that will provide the railroads with complete relief. By correcting the district court's erroneous *Ex parte Young* analysis, we make resolution of the Section Five issue unnecessary.[4] *See Ashe v. Styles*, 67 F.3d 46, 51 (4th Cir. 1995) ("[A]s is our general practice, we hesitate to adjudicate undecided constitutional issues unnecessarily."), *cert. denied*, 116 S. Ct. 1051 (1996).

III.

An injunction under the *Ex parte Young* doctrine may provide the Railroads with complete relief regardless whether

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[3] Ironically, the Railroads, in a brief filed two months before the *City of Boerne* decision, asserted that "Congress may statutorily define federal equal protection rights and prescribe remedies to enforce them, irrespective of how the courts may have interpreted them. Section 306 is precisely such a statute." Brief of Appellants at 23. The Railroads could not have known then in April that the Supreme Court would rule this practice unconstitutional in June. If we accept the Railroads' assertion that section 306 is substantive rather than remedial, we must find that the statute cannot be a valid exercise of Congress's Equal Protection Clause enforcement powers.

[4] We mention the Fourteenth Amendment Section Five issue nevertheless so as not to run the risk of our total silence being construed as a conclusion that no issue exists or as implicit acceptance of the district court's analysis. The district court raised a controversial issue, which in some appropriate future case will need to be resolved.

the state is immune from suit under the Eleventh Amendment. The theory of *Ex parte Young* is that because an unconstitutional statute is void, it cannot cloak an official in the state's sovereign immunity. Although the reasoning of *Ex parte Young* has never been extended to claims for retrospective relief, federal courts may grant prospective injunctive relief against state officials to prevent ongoing violations of federal law. *See Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)); *Gray v. Laws*, 51 F.3d 426, 430 n.1 (4th Cir. 1995). An injunction against the future collection of the illegal taxes, even those that already have been assessed, is prospective, and therefore available under the *Ex parte Young* doctrine.

A.

The district court dismissed the Railroads' claims for *Ex parte Young* relief, believing that it was without power to enjoin the levying or collection of a tax which already had been assessed. The district court thought that such an injunction would be retrospective, and thus not permitted under *Ex parte Young*, because it would require a judgment that the assessment was invalid. *See CSX Transportation, Inc. v. Board of Public Works*, No. 2:96-1905, slip op. at 17 (S.D. W.Va. Feb. 25, 1997). The court also concluded that because the injunction amounted to "some sort of a refund of the amount collected" or credit against future tax payments "'measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials'" it would be barred by the Eleventh Amendment. *See id.* at 17-18 (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). We review the district court's legal determination whether *Ex parte Young* relief is available *de novo*.

1.

The district court erred when it concluded that an injunction barring the future collection of taxes was

retrospective, and thus improper under *Ex parte Young*, once the amount of the taxes had been assessed. First, the district court hesitated to grant relief to the Railroads because to do so "would impact the State treasury in some form, whether the Railroads were to be given a cash refund for overpaying the first half taxes or a credit against the amount of taxes due for the second half." *Id.* at 16. But the Fourth Circuit has explained that *Ex parte Young* relief may still be available despite its impact on the state treasury:

> The Supreme Court has also repeatedly recognized that "relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury.

Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653, 662 (4th Cir. 1989) (quoting *Papasan v. Allain*, 478 U.S. 265, 278 (1986)), *aff'd sub nom. Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990).[5]

Second, the court believed that it could not enjoin the collection or the levying of the future taxes because such actions "are largely ministerial in nature," and the requested injunction would effectively "h[o]ld invalid and change[]" the past assessment, thereby making it a retrospective order. *CSX Transportation, Inc.*, No. 2:96-1905, slip op. at 17. However, in *Ex parte Young* itself the Supreme Court explained that it had the power to enjoin ministerial actions of state officials. *See* 209 U.S. at 158. Furthermore, our decision in *Coakley v. Welch*, 877 F.2d 304 (4th Cir. 1989), illustrates that a future

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[5] Furthermore, the district court misunderstood the form of relief requested here: the Railroads require neither a cash refund nor a credit against past taxes paid. The Railroads do not question their liability for the past taxes they have paid. They seek an injunction barring the future collection of the part of taxes illegally assessed, which portion they have withheld and refused to pay, although they have paid the balance. *See infra* at 10-12.

injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong.

Coakley alleged that a state official had violated Coakley's due process rights by firing him without good cause, and sought an injunction ordering his reinstatement. *See id.* at 305. The court "recognize[d] that from one point of view" the plaintiff had only alleged a past violation of his rights and no ongoing violation upon which to base *Ex parte Young* relief. *Id.* at 307 n.2. However, the Fourth Circuit found the view that was more consistent with Supreme Court and Fourth Circuit precedent was that the past violation "continue[d] to harm him by preventing him from obtaining the benefits of . . . employment." *Id.* An injunction to correct this ongoing harm was permissible despite its implication that his past firing had been improper. *See id.* at 306-07.

In support of the district court's opinion, the Board insists that an injunction against the future collection of taxes is retrospective if the amount of taxes has already been determined. The Board argues that the Railroads' tax liability accrued on the valuation date for the property taxes in question, December 31, 1994. Therefore, it asserts, "it is clear that the relief sought by the Railroads is not prospective because the liability attached long ago." Brief of Appellees at 32. The argument is without merit.

The Board in effect argues that an injunction against the future collection of illegal taxes is retrospective and unavailable merely because the state has already decided how much tax to collect, even though the money is still safely in the taxpayer's pocket. If we were to accept this argument, no injunction could issue pursuant to *Ex parte Young* if the action to be enjoined had already been decided upon by a state official. But, of course, plaintiffs have no way to know

that they must sue to enjoin an official's action until after the official has decided to take that action.[6]

Misconstruing the Supreme Court's holding in *Milliken v. Bradley*, 433 U.S. 267 (1977), the Board asserts that "the linchpin for determining whether recovery against State officers is appropriate is a determination of whether liability has accrued. Here, liability has accrued so no recovery can be had against the State or its officials." Brief of Appellees at 36. In *Milliken* the Supreme Court noted that the plaintiff's claim did not involve a "raid on the state treasury for an accrued monetary liability." *Milliken*, 433 U.S. at 290 n.22. The "accrued monetary liability" to which the Supreme Court was referring was one accrued *against the state*, that is, money the state owed the plaintiff. *Milliken* explained that a plaintiff could not use an injunction to force the state to pay him money it owed him. Here, the Board is arguing that because a monetary liability already has accrued *against the Railroads*, that is, because the state claims that the Railroads owe it money, *Milliken* bars relief. The Railroads do not overstate when they claim that the Board's "nonsensical argument illustrates the paucity of actual case law supporting the district court's ruling that enJoining the future collection of tax payments would actually be retroactive relief." Reply Brief of Appellants at 15.

2.

The district court further erred in holding that the injunction was retrospective because it sought a refund or credit for "a monetary loss." *CSX Transportation, Inc.*, No. 2:96-1905, slip op. at 18. The Railroads seek nothing of the

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[6] It is notable that the tentative notice of assessment of the amount of taxes due was first issued to the Railroads on September 13, 1995--nine months too late for a prospective injunction, according to the Board's argument.

kind. The Railroads have not *lost* any money: the money allegedly illegally assessed is still safely in their pockets.

The district court claimed that the relief sought by the Railroads was "directly analogous to a portion of the prohibited relief sought in *Edelman* which was 'measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.'" *CSX Transportation, Inc.*, No. 2:96-1905, slip op. at 18 (quoting *Edelman*, 415 U.S. at 668). However, the award disallowed in *Edelman* which was "measured in terms of a monetary loss," was an award of equitable restitution, "in practical effect indistinguishable in many aspects from an award of damages against the State." *Edelman*, 415 U.S. at 668. In the instant case, no award of any money need be made from the state treasury. Instead, money which state officials would otherwise collect from the Railroads, in violation of federal law, will be protected from collection.

It is of no import that the state officials have already decided how much money they want illegally to collect, nor that they have already decided how they want to spend the money they intend in the future illegally to collect, nor that the state will have to expend its own funds to make up for the funds it was not allowed illegally to collect. The point is that the future collection is illegal.[7] Section 306 not only prohibits discriminatory tax assessments, but specifically prohibits the collection of any tax based upon such an assessment. *See* 49 U.S.C. § 11501(b)(2). Injunctive relief is available under *Ex parte Young* to prevent such a future violation of federal law.

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[7] We have assumed that the Railroads would prevail on the merits for the limited purpose of evaluating the district court's dismissal for lack of subject matter jurisdiction. Upon remand, the Railroads will still have to prove that the amount of taxes they have withheld was assessed in violation of section 306 of the 4-R Act. We make no judgment regarding the merits of this contention.

Echoing the district court's mistake, the Board argues that because the Railroads have already paid half of the taxes assessed, they may not recoup the allegedly discriminatory overassessment from their first one-half payment because such recoupment would come out of the state treasury and be retrospective relief. The Board's mistake is in its premise: the Railroads need not seek to "recoup" anything here. They need only to enjoin the future collection of the amount of taxes that was assessed illegally to be provided full relief.

An example will illustrate the unnecessary complication required to create a retrospective injunction in this case. Assume that the amount of taxes assessed was $10.00, but the lawful amount was only $8.00, and the Railroads had already paid one half of the assessment, $5.00. We could enjoin the collection in the future of the $2.00 of unlawful discriminatory over-taxation, and permit only the collection of the remaining $3.00. That would only be prospective relief. Were we to fashion an injunction ordering the Railroads to pay only an additional $4.00 as a second half-payment and also ordering the state to refund $1.00 from the first half-payment, that refund would be retrospective relief.[8] But why we would order such an unnecessarily complex and invalid injunction when a simple, valid remedy is available is difficult to understand.

B.

Regardless of when the state defendants completed the tax assessment, the action that the Railroads seek to enjoin--the collection of illegal taxes--has not yet occurred. The injunction that the Railroads seek is thus precisely the type of

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[8] The injunction prohibiting the state from collecting more than the lawful $4.00 of the second one-half payment would be prospective, however. Even according to its own misunderstanding of the required relief, therefore, the district court was incorrect to dismiss the Railroads' action *in its entirety*.

relief contemplated by *Ex parte Young*. The district court's order dismissing the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is therefore reversed, and the case is remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 4, 1998

No. 97-1296
CA-96-1905-2

CSX Transportation v. Board of Pub Works

MANDATE

The judgment of this Court dated 3/10/98 takes effect today.

PATRICIA S. CONNOR
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

CSX TRANSPORTATION, INC., et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 2:96-1905

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending are (1) Defendants' motion for summary judgment which the Court treats as a motion to dismiss pursuant to Rule 12(b)(1), *Federal Rules of Civil Procedure*; and (2) Plaintiffs' motion for a preliminary injunction. The Court **GRANTS** the motion to dismiss and **DENIES** as moot the motion for a preliminary injunction.[1]

I. FACTUAL BACKGROUND

Plaintiffs CSX Transportation, Inc. ("CSXT") and Nicholas, Fayette & Greenbrier Railroad Company ("NF&G") challenge their West Virginia *ad valorem* tax assessments for the 1996 tax year. They request injunctive and declaratory relief pursuant to Section 306 of the Railroad Revitalization

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[1] Plaintiffs requested oral argument on the motions. The facts and legal theories, however, are well-briefed and oral argument would not materially aid the decisional process. Accordingly, the Court **DENIES** Plaintiffs' request.

and Regulatory Reform Act of 1976, 49 U.S.C. § 11501 (the "4-R Act").

Plaintiffs allege the West Virginia Board of Public Works ("Board") and its members assessed their property at a ratio of
assessed value to true market value more than five percent greater than the ratio of assessed value to true market value at which other commercial and industrial property was assessed for the 1996 tax year in violation of Section 306(1)(a) and (b) of the 4-R Act. The named Defendants are the Board and its individual members, namely the Governor, State Treasurer, State Auditor, Attorney General, Commissioner of Agriculture, and State Superintendent of Schools.[2]

CSXT and NF&G paid the first half of their taxes for the 1996 tax year. The payment of the second half is due on or before March 1, 1997. The Railroads assert "[a]ll of the relief [they] seek in this case can be recovered from that second-half payment." Defs.' mem. in oppos. at 3.

Defendants moved for summary judgment seeking dismissal because of the recent decision of the United States Supreme Court in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996).[3] The Railroads offer three arguments to

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[2] Plaintiffs inadvertently failed to name Secretary of State Ken Hechler, also a member of the Board. The Court makes this correction on its own motion.

[3] In a nutshell, Seminole Tribe stands for the proposition that Congress lacks authority under the Indian Commerce Clause to abrogate a state's Eleventh Amendment immunity. Seminole Tribe, 116 S. Ct. at 1131-32. Perhaps the more weighty implication of Seminole Tribe, however, is its overruling of Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), which held Congress had the power under the Interstate Commerce Clause to abrogate Eleventh Amendment immunity. Seminole Tribe, 116 S. Ct. at 1131. Consequently, the only remaining source of abrogation power after

avoid dismissal. First, they assert Seminole Tribe does not operate here because Congress possesses the authority to enact Section 306 pursuant to its powers under section 5 of the Fourteenth Amendment, although it did not choose that route with the enactment of the 4-R Act. Second, they assert this Court has jurisdiction to order prospective injunctive relief against the individual officials of the Board, pursuant to Ex parte Young, 209 U.S. 123 (1908). Finally, Plaintiffs assert they can cure any alleged jurisdictional defect by adding as Defendants, and proceeding against, the counties where CSXT and NF&G own taxable property.[4]

II. DISCUSSION

A. The 4-R Act and the Fourteenth Amendment:

In Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996) the Court of

Appeals restated the familiar contours of Eleventh Amendment immunity:

> The Eleventh Amendment provides: '[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.' Although by its terms the Amendment applies only to suits brought against a state by 'Citizens of another State,' it is well established that 'an unconsenting State is immune

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Seminole Tribe is section 5 of the Fourteenth Amendment. Id. at 1125.

[4] Plaintiffs do not argue the State has waived its immunity or consented to suit. Plaintiffs also concede the Board is a state entity entitled to the immunity accorded by the Eleventh Amendment protection to the states.

> from suits brought in federal courts by her own citizens as well as by citizens of another State. This immunity applies to state agencies that may be properly characterized as 'arm[s] of the State[.]'

Id. at 337 (citations omitted).

Under limited circumstances, however, Congress may abrogate a state's Eleventh Amendment immunity. In Seminole Tribe, the Court reiterated the two-part inquiry to determine whether Congress effectively abrogated a state's sovereign immunity from suit in a federal forum:

> [W]e ask two questions: first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,'; and second, whether Congress has acted 'pursuant to a valid exercise of power.'

Seminole Tribe, 116 S. Ct. at 1123 (quoted authority omitted).

Even assuming Plaintiffs can demonstrate the first prong of the test, Congress could not have abrogated Eleventh Amendment immunity under the Fourteenth Amendment. The very recent decision of Union Pac. R.R. Co. v. Burton, No. 96-CV-163-J, 1996 WL 733943 (D. Wyo. Dec. 24, 1996) makes this and related points tellingly.

In Burton, similar to the instant dispute involving West Virginia, plaintiff railroads challenged the 1996 valuation, assessment and equalization of certain property in Wyoming as a violation of section 306. The Wyoming defendants asserted Eleventh Amendment immunity based on Seminole Tribe. Like Plaintiffs here, the aggrieved taxpayers in Burton argued Congress possessed the authority when enacting the 4-R Act, whether or not it relied on that authority, to abrogate the states' Eleventh Amendment immunity. While the Wyoming Court entertained the suggestion, it ultimately

ruled against plaintiffs. Its analysis is worth the lengthy quote:

> [U]nder any test the court cannot find Congress could have enacted the 4-R Act pursuant to Section 5 legislation to enforce the Fourteenth Amendment.
>
> As discussed above, the purpose of the 4-R Act, as originally enacted, was to 'provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States.' These are economic objectives designed to further commerce by strengthening the transportation infrastructure of the United States. This was surely an admirable goal and it was well within the power of Congress acting pursuant to the Interstate Commerce Clause to further such objectives. However, such commercial objectives are far afield from the equally admirable objectives of the Fourteenth Amendment.
>
> It is only in relation to one of 'the means chosen by Congress to fulfill these objectives, particularly the goal of furthering railroad financial stability,' that discrimination is mentioned.
>
> As recodified in 1996, the legislative purpose of the 4-R Act is now found at 49 U.S.C. § 10101. That section sets forth, in fifteen numbered paragraphs, the policy of the United States in regulating the railroad industry. Many of these fifteen subsections are themselves divided into yet more clauses setting forth additional objectives. Most of the objectives are commercial and are aimed at furthering commerce by increasing competition and other free market forces. Some of the policies evidence an intent to further both commercial objectives as well as other national objectives. Others, such as subsection (11) ("to encourage fair

wages and safe and suitable working conditions"), further commerce by promoting the well-being of its participants. It is only one clause of subsection (12) that discusses discrimination as an objective:

> (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination.

Viewed as a total, the legislative purpose and predicate cannot be read as evidencing a purpose to enforce rights under the Fourteenth Amendment. This court cannot find that there is any evidence by way of a factual predicate to support a finding that the 4-R Act was enacted to further anti-discriminatory or equal protection claims. Nor can this court regard the legislation as an enactment to enforce the Fourteenth Amendment.

Accordingly, Union Pacific's claim that Congress could have enacted the 4-R Act under the Fourteenth Amendment fails.

Id. at *9-10 (citations and quoted authority omitted).

The Court concurs with the analysis in Burton.[5] Accordingly, the Court concludes the attempted abrogation of Eleventh Amendment immunity in the 4-R Act was ineffective because Congress did not legislate pursuant to a valid exercise of power.

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[5] Plaintiffs rely heavily on the unpublished decision in Consolidated Rail Corp. v. State Board of Equalization and Assessment of the State of New York, No. 93 Civ. 6548 (CLB)(S.D.N.Y. Nov. 27, 1996) which runs contrary to the 4-R Act analysis in Burton. The Court finds the extended discussion and analysis in Burton more persuasive than the few paragraphs devoted to the issue in Consolidated Rail.

B. The Ex Parte Young Exception and the Individual Board Members' Amenability to Suit:

Gray v. Laws, 51 F.3d 426 (4th Cir. 1995), discussed the parameters of Eleventh Amendment immunity as such relate to state officials:

> Like the state itself, state officers acting in their official capacity are also entitled to Eleventh Amendment protection, because 'a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office,' and '[a]s such, it is no different from a suit against the State itself.'

Id. at 431 (quoting Will v. Michigan Dep't. of State Police, 491 U.S. 58, 71 (1989)(citations omitted)).

There is, however, a substantial caveat to this general rule emanating from Ex Parte Young, 209 U.S. 123 (1908): "A state and its officers are not entitled to Eleventh Amendment protection . . . where a plaintiff seeks only prospective, injunctive relief." Id. at 430 n.1; Edelman v. Jordan, 415 U.S. 651, 664-68 (1974). But see, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)(recognizing "the [Ex parte Young] exception is narrow: It applies only to prospective relief, [and] does not permit judgments against state officers declaring that they violated federal law in the past").

Accordingly, "[w]here the action is one for damages, past debts or retroactive relief of any type, it is barred whether it is brought in law, equity, or admiralty. Thus federal suits at law for return of improperly collected state taxes are barred." 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law--Substance and Procedure § 2.12 (2d. ed. 1992); see Hafer v. Melo, 502 U.S. 21, 30 (1991)(stating

"[T]he doctrine of Ex parte Young does not apply where a plaintiff seeks damages from the public treasury"); Papasan v. Allain, 478 U.S. 265, 278, 282 (1986)(observing it is improper to "bestow an award for [an] accrued monetary liability"); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105-06 (1984); Guardians Ass'n. v. Civil Serv. Com'n. of City of New York, 463 U.S. 582, 604 (1983); Scheurer v. Rhodes, 416 U.S. 232, 238 (1974)(stating "[I]t is clear that the doctrine of Ex parte Young is of no aid to a plaintiff seeking damages from the public treasury[.]"); Rehabilitation Ass'n. of Virginia, Inc. v. Kozlowski, 42 F.3d 1444, 1449 (4th Cir. 1994); Austin v. Berryman, 862 F.2d 1050, 1056 (4th Cir. 1988); Randall v. Lukhard, 709 F.2d 257, 269 (4th Cir. 1983); Kimble v. Solomon, 599 F.2d 599, 603 (4th Cir. 1979).

In making the determination between prohibited and authorized relief, courts are directed to "look to the substance rather than to the form of the relief sought[.]" Papasan, 478 U.S. at 279. What appears on its face as an easily drawn distinction often has proven difficult in application. Edelman lightly understated the proposition that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be . . . between day and night." Edelman, 415 U.S. at 667; Guardians Ass'n., 463 U.S. at 604; Pennhurst, 465 U.S. at 105; Papasan, 478 U.S. at 278; Coakley v. Welch, 877 F.2d 304, 306 (4th Cir. 1989).

The elusive contours underlying the distinction arise from the principle that "a private person may bring an equitable action to force state officers to comply with federal law in the future even though they will be required to spend state funds to so comply." 1 Ronald D. Rotunda & John E. Nowak, *supra* § 2.12 (emphasis added). The principle has been illustrated in many cases, with a representative discussion appearing in Edelman:

> The injunction issued in Ex parte Young was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in Ex parte Young. In Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young *supra*."

415 U.S. 651, 667-68 (emphasis added).[6]

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[6] In Papasan, the Court further attempted to illuminate the distinction:

> Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state

Despite this language, however, the general rule precluding monetary relief that grants a retroactive claim on the funds of a state remains intact. See, e.g., Missouri v. Jenkins, 115 S. Ct. 2038, 2070 n.5 (1995)(Thomas, J., concurring)(stating "Of course, the state treasury inevitably must fund a State's compliance with injunctions commanding prospective relief, but that does not require a State to supply money to comply with orders that have a backward-looking, compensatory purpose."); Green v. Mansour, 474 U.S. 64, 68 (1985)(stating "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."); Guardians Ass'n., 463 U.S. at 604 (stating

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> official is the named defendant. This is true if the relief is expressly denominated as damages. It is also true if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else. On the other hand, relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury.

478 U.S. at 278 (citations omitted). The Papasan opinion revealed the following voting coalitions:

> WHITE, J., delivered the opinion of the Court, in which O'CONNOR, J., joined; in Parts I and III of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined; and in Part II of which BURGER, C.J., and POWELL and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined . . . . BLACKMUN, J., filed an opinion concurring in part and dissenting in part . . . . POWELL, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C.J., and REHNQUIST, J., joined . . .

The fractured Papasan opinion, and others like it, add a further measure of uncertainty for a lower court attempting to apply the theoretical distinctions involved.

"The key question for present purposes is whether the decree requires the payment of funds or grants other relief, 'not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation' or other relief based on or flowing from violations at a prior time when the defendant 'was under no court-imposed obligation to conform to a different standard.'"); Rehabilitation Ass'n., 42 F.3d at 1449; Coakley, 877 F.2d at 307; Manning v. South Carolina Dep't. of Highway & Public Transp., 914 F.2d 44 (4th Cir. 1990)(stating "the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment."); Austin v. Berryman, 862 F.2d 1050, 1056 (4th Cir. 1988)(stating "a retroactive benefits payment check, if made, would be at the request of the Comptroller and signed by the State Treasurer. Such a payment 'is in practical effect indistinguishable in many aspects from an award of damages against the State.'"); Kimble, 599 F.2d at 603 (noting the impropriety of an order that is, in effect, "'a raid on the state treasury for an accrued monetary liability.'")(quoted authority omitted).[7]

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[7] The Edelman decision provided further guidance that directly aids this Court:

> [One portion of the district court's decree] is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials. Were we to uphold this portion . . . we would be obligated to overrule the Court's holding in Ford Motor Co. v. Department of Treasury, *supra*. There a taxpayer, who had, under protest, paid taxes to the State of Indiana, sought a refund of those taxes from the Indiana state officials who were charged with their collection. The taxpayer claimed that the tax had been imposed in violation of the United States Constitution. The term 'equitable restitution' would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money and paid it over to the State pursuant to an allegedly

Defendants mount a two-pronged attack against Plaintiffs' attempts to circumvent the Eleventh Amendment bar via Ex Parte Young, 209 U.S. 123 (1908). First, Defendants assert there is nothing to prospectively enjoin for the 1996 tax year. Second, Defendants more inferentially assert that the requested relief would operate as an illegitimate award of retroactive damages for an accrued monetary liability. The assessment, collection and disbursement mechanisms of public utility taxation in West Virginia are implicated by the latter defense.

On or before May 1 each year the Railroads are required to file a return with the Board. Based on the return and other information, the Board assesses and fixes the true value of the Railroads' property. For the 1996 tax year, the Board finalized Defendants' proposed assessments on December 20, 1995. The state auditor certified the assessments to the counties in March 1996. The first half taxes were due no later than September 1, 1996. Plaintiffs paid the first half of these taxes on August 30, 1996 and instituted this action approximately one month later.

The state auditor is responsible for collecting and distributing Defendants' tax payments among the counties where the Railroads own property. Here, the first half tax payments have been made by the Plaintiffs and previously disbursed by the Defendant auditor, a portion going to the

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> unconstitutional tax exaction. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case.

Edelman, 415 U.S. at 668-69 (emphasis added).

counties and a portion retained by the state treasury.[8] A substantial amount of the monies transmitted to the counties funds public schools.

While Plaintiffs disagree, school funding is clearly a joint effort of the county boards of education and the State. W. Va. Code § 18-9A-1. Under the School Foundation Formula, each county contributes its "local share" toward school funding. The counties receive one dollar less in State aid for every dollar collectible as the local share. The funding scheme is explained in greater detail by the uncontested affidavit of Carolyn Arrington, Assistant State Superintendent for the West Virginia State Department of Education:

> The State of West Virginia provides funding for the basic foundation program for each county. The counties through receipt of property taxes collected by the county and by the State through its assessment of public utilities and other centrally assessed property then contributes its share toward the State's public schools.
>
> With regard to the 1996 tax assessments, the county boards of education have relied upon projected tax collections in preparing their proposed budgets.
>
> The projected tax collections used in preparing the proposed budget for the forthcoming year are based on the assessed valuations of the current year. For example, the projected tax

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[8] Percentage-wise, only a small portion is retained by the State. See W. Va. Code § 11-6-26 (stating "The auditor shall establish a special operating fund in the state treasury for the public utilities division in his or her office. The auditor shall pay into the fund three eighths of one percent of the gross receipts of all moneys collected as provided for in this article."). While the percentage is small, the amount of actual dollars involved is likely significant.

collections for the 1996-97 fiscal year are based on the assessed valuations as certified by the assessor on March 3, 1996 (1996 Tax Year). For public utility property, the valuations are based on the . . . date of December 31, 1994. For all other property, the valuations are based on the assessment date of July 1, 1995.

The local share calculated under the Public School Support Program for the forthcoming year is also calculated on the current year's assessed valuations as certified by the assessor. The calculation is an estimation of the projected regular levy tax collections to be received by each county board of education during the subsequent year. For example, the assessed valuations used in the calculations for the 1996-97 fiscal year computations of State aid were those certified by the county assessors on March 3, 1996.

Consequently, any reductions made to Tax Year 1996 assessments will have an adverse affect on the county boards' 1996-97 fiscal year revenues, since the assessments were used in the local share calculations to determine the State's appropriation under the Public School Support Program. Each board's share of State aid has been reduced as a result of the projected tax collections which are anticipated. If revenues are not as anticipated because of a reduction in assessments, the county boards of education will experience a short-fall. In addition, the boards with excess levies will realize an additional loss in revenues from the projected excess levy tax collections. As a result, the boards' actual collections will fall far short of the amounts used in preparing their proposed budgets for the 1996-97 year.

> If the county revenues are not as anticipated, West Virginia law provides a mechanism which allows an adjustment to be made by the West Virginia Legislature to insure that appropriate funding is received by each county. Therefore, loss of any portion of the tax collections anticipated from the railroads will result in 1) a direct loss to the State in the amount of retained revenue and 2) a loss in funding for the state public schools.

Aff. of Carolyn Arrington (emphasis added).

First, there is little doubt reductions in Plaintiffs' tax liability would impact the State treasury in some form, whether the Railroads were to be given a cash refund for overpaying the first half taxes or a credit against the amount of taxes due for the second half. The State fisc in either event would lose money directly via the loss of dedicated funds and the loss or shortfall of public education funding at the county level.

As Plaintiffs concede, the assessments became final in February 1996. Compl. ¶ 27. The levying process also likely concluded months ago, although the Court has not been able to affix a precise date for the event. It is true the 4-R Act prohibits the unlawful assessment, levy or collection of certain taxes. 49 U.S.C. § 11501(b)(1)-(3). It is also true West Virginia has assessed, levied and collected taxes against the Plaintiff Railroads in violation of the 4-R Act recently. See CSX Transp. Inc. v. Board of Public Works of the State of West Virginia, 95 F.3d 318 (4th Cir. 1996). While Plaintiffs complain about all three, the linchpin is the tax assessment, which became final some time ago. The collection, and even the levying process, are largely ministerial in nature. The only way Plaintiffs could secure the relief they seek would be for the assessment to be held invalid and changed. Unfortunately, such a retrospective order would be improper under Ex Parte Young and its most recent progeny, Seminole Tribe, *supra*. The primary violation of

federal law occurred long ago when the assessment became final.

Of greater concern to the Court, however, is the "substance" of the relief sought. Regardless of their careful, formal pleading, the sum and substance of the Railroads' complaint is that (1) they were wronged when Defendants unlawfully assessed the 1996 taxes and proceeded to collect the first-half payment; and (2) Plaintiffs are entitled to some sort of a refund of the amount collected or a credit against the second-half payment. In the Court's view, Plaintiffs implicitly seek just the type of "backward-looking, compensatory" or accrued monetary relief barred by the Eleventh Amendment. Jenkins, 115 S. Ct at 2070. As noted, this is directly analogous to a portion of the prohibited relief sought in Edelman which was "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." Edelman, 415 U.S. at 668. The past breach of a legal duty here occurred when Defendants improperly assessed Plaintiffs' holdings. As a result of this breach, Plaintiffs suffered a monetary loss which they now seek to remedy. Further, the necessary monetary relief would play a primary, not "ancillary," role in the

crafting of an injunction.[9] Accordingly, the individual Defendants are entitled to Eleventh Amendment immunity.[10]

III. CONCLUSION

The Court **GRANTS** Defendants' motion to dismiss pursuant to Rule 12(b)(1), *Federal Rules of Civil Procedure* and **DENIES** the requests for oral argument and to amend the complaint. The Motion for a preliminary injunction is **DENIED** as moot.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record.

ENTER: February 25, 1997

/s/ Charles H. Haden II
Charles H. Haden II, Chief Judge

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[9] The result is the same if Plaintiffs are viewed as seeking only a tax credit. The result would work a decrease in State revenues, and "[a] decrease in state revenues certainly and directly affects the state treasury." See, e.g., Robbins Resource Recov. Partners L.P. v. Edgar, No. 96 C 1735, 1996 WL 666712, *3 (N.D. Ill. Nov. 8, 1996); Swanson v. Powers, No. 89-282-CIV-5-H, 1990 WL 545761, *5 (E.D.N.C. Aug. 16, 1990), rev'd. on other grounds, 937 F.2d 965 (4th Cir. 1991), cert. denied, 502 U.S. 1031 (1992)(stating "[A tax credit] remedy is still one for accrued monetary liability that would be satisfied out of the general revenues of the state . . . [and] plaintiffs cannot avoid the eleventh amendment by receiving their award in the form of future tax credits, rather than present cash payments.").

[10] As noted *supra*, Plaintiffs briefly argue they should be able to amend the complaint to add the individual counties where their property is located. As Defendants correctly note, however, the counties neither assess nor collect the taxes in question. They cannot provide the relief Plaintiffs seek. Accordingly, the requested amendment would be futile.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

CSX TRANSPORTATION INC., *et al.*,

Plaintiffs,

vs. CIVIL ACTION NO. 2:97-1905

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, *et al.*,

Defendants.

JUDGMENT ORDER

In accordance with the Memorandum Opinion and Order entered this date, the Court **ORDERS** as follows:

1. That Defendants' motion to dismiss pursuant to *Rule* 12(b)(1), *Federal Rules of Civil Procedure*, is **GRANTED**;

2. That Plaintiffs' motion for a preliminary injunction is **DENIED** as moot; and

2. That this case is **DISMISSED** and stricken from the Court's docket.

The Clerk is directed to send a copy of this Judgment Order to counsel of record.

ENTER: February 25, 1997

/s/ Charles H. Haden II
Charles H. Haden II, Chief Judge

C-1

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
March 27, 1997

No. 97-1296
CA - 96-1905-2

CSX TRANSPORTATION, INCORPORATED; NICHOLAS, FAYETTE AND GREENBRIER RAILROAD COMPANY

Plaintiffs - Appellants

v.

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA; GASTON CAPERTON, III, Governor; LARRIE BAILEY, State Treasurer; GLEN B. GAINER, III, State Auditor; DARRELL V. MCGRAW, JR., Attorney General; GUS DOUGLASS, Commissioner of Agriculture; HANK MAROCKIE, State Superintendent of Schools

Defendants - Appellees

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O R D E R

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Appellants have filed a motion for injunction pending appeal. Appellees have filed a response in opposition to the motion.

The Court denies the motion. Entered at the direction of Judge Hall, with the concurrence of Judge Murnaghan and Judge Hamilton.

FOR THE COURT

/s/ Patricia S. Connor

CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

CSX TRANSPORTATION, INC., *et al.*,

Plaintiffs,

vs. CIVIL ACTION NO. 2:96-1905

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending is Plaintiffs' renewed motion for a preliminary injunction, pending appeal filed February 26, 1997. On February 25, 1997 the Court dismissed this case for lack of jurisdiction pursuant to *Rule* 12(b)(1), *Federal Rules of Civil Procedure*.[1] It is too late for the Court now to resume jurisdiction over the case and grant the relief sought by Plaintiffs. See Union Pac. R.R. Co. v. Burton, No. 96-CV-163-J, 1996 WL 733943, at *11 (D. Wyo. Dec. 24, 1996)("Having determined today that Congress did not have the power to abrogate the States' Eleventh Amendment immunity from suit in this court under the 4-R Act, this court has no jurisdiction to issue . . . a[ ] [preliminary]

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[1] Interestingly, the Court converted Defendants' motion for summary judgment to a *Rule* 12(b)(1) motion largely at Plaintiffs' behest. See Pls.' mem. in oppos. at 19 (stating "the motion should have been made as a motion to dismiss under Rule 12(b)(1)" and "[i]f a district court lacks jurisdiction, it cannot rule on the merits.").

injunction.").[2] Accordingly, the Court **DENIES** Plaintiffs' motion.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record.

ENTER: February 26, 1997

/s/ Charles H. Haden II
Charles H. Haden II, Chief Judge

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[2] Plaintiffs rely upon Biggs v. Meadows, 66 F.3d 56, 60 (4th Cir. 1995) in asserting the Eleventh Amendment is not a true limit on the jurisdiction of the federal courts. This Court has relied on Biggs for that precise proposition in unrelated litigation.

Plaintiffs are referred, however, to the Supreme Court's implicit clarification of that issue in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996). See also Wilson-Jones v. Caviness, 99 F.3d 203, 206 (6th Cir. 1996), amended on denial of rehearing, 1997 WL 57109, *1-2 (6th Cir. Jan. 16, 1997)(citing Biggs but observing that after Seminole "state immunity is jurisdictional in the same sense as the complete diversity requirement or the well-pleaded complaint rule.").

West Virginia Constitution

Art. XII, § 1

The legislature shall provide, by general law, for a thorough and efficient system of free schools.

West Virgina Code

§ 11-6-11. Valuation of property by board

Upon the fifteenth day after giving the notices required by section nine of this article, or as soon thereafter as reasonably convenient but not later than the first day of October, the board of public works shall proceed to assess and fix the true and actual value of all property of such owner or operator hereinbefore required to be returned, in each county through which the railroad, car line, cars, express, telegraph, telephone, or pipeline of such owner or operator runs, and in which any property to be assessed is located. In ascertaining such value the board shall consider the return, if any, made by the owner or operator, and any return which may have been previously made by such owner or operator, the work sheets and tentative assessment recommended by the tax commissioner, such evidence or information as may be offered by such owner or operator, such further evidence or information as may be required by the board of such owner or operator, and any other pertinent evidence, information and data. Any and all evidence, information and data, at a regular meeting of the board held for such purpose at least fifteen days after giving the notice required by section nine of this article. Before any assessment shall be made by the board, any and all evidence, information and data considered by the board shall be available for inspection by any such owner or operator or his duly authorized representative, and an opportunity given to be heard thereon when the board of public works has assessed any property hereby required to be

returned, and has determined the valuation thereof, such assessment and valuation shall be entered of record in the book of minutes of its proceedings, and shall be certified by the secretary of the board to the auditor.

Nothing in this chapter contained shall be construed to require the assessment by the board of public works of any part of a railroad, telegraph, telephone or pipeline until such part is so far completed as to be fit for use. But material held by any railroad, telegraph, telephone or pipeline company shall be returned to the board of public works for assessment as personal property. As soon as such assessment is made, the secretary of the board shall notify the owner or operator affected thereby of the amount thereof by written notice deposited in the United States post office, addressed to such owner or operator at the principal office or place of business of such owner or operator. Such assessment and valuation shall be final and conclusive, unless the same be appealed from in the manner following, within fifteen days after such notice is so deposited.

§ 11-6-12. Appeal from valuation by board

Any owner or operator claiming to be aggrieved by any such decision may, within the time aforesaid, apply by petition in writing, duly verified, to the circuit court of the county in which the property so assessed is situated, or if such property be situated in more than one county then in the county in which the largest assessment of such owner or operator was made in the next preceding year, for an appeal from the assessment and valuation so made of all such property, and jurisdiction is hereby conferred upon and declared to exist in the court, in which such application is filed, to grant, docket and hear such appeal; and such appeal, as to all of the property so assessed, as well as that situated in the county of the court so applied to, as that situated in the several other counties, shall forthwith be allowed by such court so applied to, and be heard by such court as to all of

such property as soon as possible after the appeal is docketed, but notice in writing of such petition shall be given to the secretary of state, as secretary of the board of public works, by mailing a copy of the petition for an appeal filed as aforesaid, which said petition shall recite the fact that copies of such petition have been sent by registered mail. Notice in writing of the hearing upon such petition shall be given to the state tax commissioner at least fifteen days beforehand. Likewise, the state tax commissioner, may by giving notice in writing at least fifteen days beforehand to the petitioner, bring on such appeal for hearing. Upon such hearing the court shall hear all such legal evidence as shall be offered on behalf of the state or any other county, district or municipal corporation interested, or on behalf of the appealing owner or operator. If the court be satisfied that the value so fixed by the board of public works is correct, it shall confirm the same, but if it be satisfied that the value so fixed by the board is either too high or too low, the court shall correct the valuation so made and shall ascertain and fix the true and actual value of such property according to the facts proved, and shall certify such value to the auditor and to the secretary of the board of public works. The state or the owner or operator may appeal to the supreme court of appeals if the assessed value of the property be fifty thousand dollars or more.

If the court to which an application for appeal would properly be made as aforesaid shall not be in session, the judge thereof in vacation shall forthwith allow the appeal, and if the judge thereof be disqualified or for any reason not be available, the filing of the aforesaid petition in the office of the clerk of the circuit court of the county in which the largest assessment of such owner or operator was made in the preceding year, within the time of aforesaid, shall constitute sufficient compliance with this section, and the appeal shall thereafter be proceeded with as otherwise provided in this section.

§ 11-6-18. Payment of assessment by owner or operator

The auditor shall, as soon as possible after such assessment is completed, make out and transmit by mail or otherwise, to such owner or operator, a statement of all taxes and levies so charged, and it shall be the duty of such owner or operator, so assessed and charged, to pay one half of the amount of such taxes and levies into the treasury of the State by the first day of September and the remaining one half by the first day of the following March, subject to a deduction of two and one half per centum if the taxes be paid on or before the date due. If such owner or operator fail to pay such taxes and levies when due, interest thereon at the rate of nine per centum per annum until paid shall be added, and the auditor shall certify, after the date the second installment is due, to the sheriff of each county, the amount of such taxes and levies assessed within his county; and it shall be the duty of every sheriff to collect and account for such taxes and levies in the same manner as other taxes are levied or collected and accounted for by him. The payment of such taxes and levies by any such owner or operator shall not prejudice or affect the right of such owner or operator to obtain relief against the assessment or valuation of its property in proceedings now pending or hereafter brought under the provisions of section twelve of this article, or in any suit, action or proceeding in which such relief may be obtainable; and if under the provisions of said section twelve or in any suit, action or proceeding, it be ascertained that the assessment or valuation of the property of such owner or operator is too high and the same is accordingly corrected, it shall be the duty of the auditor of the State to issue to the owner or operator a certificate showing the amount of taxes and levies which have been overpaid, and such certificate shall be receivable thereafter for the amount of such overpayment in payment of any taxes and levies assessed against the property of such owner or operator, its successors or assigns. It shall likewise be the duty of said auditor to certify to the county courts, school districts and municipalities, the amounts of the respective overpayments

distributable to such counties, school districts and municipalities. All moneys received by the auditor under the provisions of this section shall be transmitted to the several counties within twenty days from receipt thereof.

§ 11A-1-3. Accrual; time for payment; interest on delinquent taxes

(a) All current taxes assessed on real and personal property may be paid in two installments. The first installment shall be payable on September first of the year for which the assessment is made, and shall become delinquent on October first; the second installment shall be payable on the first day of the following March and shall become delinquent on April first. Taxes paid on or before the date when they are payable, including both first and second installments, shall be subject to a discount of two and one-half percent. If taxes are not paid on or before the date on which they become delinquent, including both first and second installments, interest at the rate of nine percent per annum shall be added from the date they become delinquent until paid.

(b) With regard to real and personal property taxes, when any return, claim, statement or other document is required to be filed, or any payment is required to be made within a prescribed period or before a prescribed date, and the applicable law requires delivery to the office of the sheriff of a county of this state, the methods prescribed in section five-f, article ten, chapter eleven of this code for timely filing and payment to the tax commissioner or department of tax and revenue shall be the same methods utilized for timely filing and payment with such sheriff. Nothing contained in this subsection (b) shall prohibit the sheriff from establishing additional methods of payment in accordance with the provisions of section eight-a of this article.

§ 18-9A-12. County basic foundation; total basic state aid allowance

(a) The basic foundation program for each county for the fiscal year shall be the sum of the amounts computed in accordance with the provisions of sections four, five, six, seven, eight, nine and ten of this article. On the first working day of July in each year, the state board shall determine the basic foundation program for each county for that fiscal year. Data used in the computations relating to net and adjusted enrollment, and the number of professional educators, shall be for the second month of the prior school term. Transportation expenditures used in these computations shall be for the most recent year in which data are available. The allocated state aid share of the county's basic foundation program shall be the difference between the cost of its basic foundation program and the county's local share as determined in section eleven of this article except as provided in subsection (b) of this section.

(b) The allocated state aid share shall be adjusted in the following circumstances in the following manner: Provided, That prior to such adjustment, the state tax commissioner shall provide the state board, by the fifteenth day of January of each year, a certified listing of those counties in which such adjustment shall be made pursuant to this subsection, together with the amount of revenue which will not be available to each county board in the ensuing fiscal year as a result of the circumstance:

(1) In those instances where the local share as computed under section eleven of this article is not reflective of local funds available because the county is under a final court order to refund or credit property taxes paid in prior years, the allocated state aid share shall be the county's basic foundation program, minus the local share as computed under section eleven of this article, plus the amount of property tax the county is unable to collect or must refund due to the final court order: Provided, That said adjustment shall not be

made or shall only be made proportionately when the Legislature fails to fund or funds only in part the public school basic foundation support plan state share at a level sufficient to cover the reduction in state share: Provided, however, That nothing herein provided shall be construed to require or mandate any level of funding by the Legislature.

(2) In those instances where the local share as computed under section eleven of this article is not reflective of local funds available because the county is collecting tax based upon an assessed value which is less than that determined by the tax commissioner in the most recent published survey of property valuations in the state due to an error in the published survey, which error is certified to by the tax commissioner, the allocated state aid share shall be the county's basic foundation program, minus the local share as computed under section eleven of this article, plus the amount of property tax the county is unable to collect based on differences in the assessed valuation between those in the most recent published survey of valuation and the corrected assessed value actually levied upon by the county: Provided, That said adjustment shall not be made or shall only be made proportionately when the Legislature fails to fund or funds only in part the public school basic foundation support plan state share at a level sufficient to cover the reduction in state share: Provided, however, That nothing herein provided shall be construed to require or mandate any level of funding by the Legislature.

(3) In instances where a county is unable to collect property taxes from a taxpayer during the pendency of any court proceeding, the allocated state aid share shall be the county's basic foundation program minus the local share as computed under section eleven of this article, plus the amount the county is unable to collect as a result of the pending court proceedings as certified by the tax commissioner: Provided, That the county is required to reimburse the amount of allocated state aid share attributable to the amount of property tax it later receives upon completion of court proceedings,

which shall be paid into the general revenue fund of the state: Provided, however, That said adjustment shall not be made or shall only be made proportionately when the Legislature fails to fund or funds only in part the public school basic foundation support plan state share at a level sufficient to cover the reduction in state share: Provided further, That nothing herein provided shall be construed to require or mandate any level of funding by the Legislature.

(c) The allocated state aid share shall be adjusted in any county receiving payments or contributions in lieu of property taxes. In instances where a county receives payments or contributions in lieu of property taxes, the allocated state aid share shall be the county's basic foundation program minus the local share as computed under section eleven of this article, plus any amounts added pursuant to subsection (b) of this section minus the payments or contributions in lieu of property taxes which are distributed by the sheriff to the county board of education. In determining the amount of such contribution or payment in lieu of taxes, each county commission shall provide to the state tax commissioner, by the first day of January of each year, the total amount of such payments or contributions paid to the county and the proportion of the total amount that has been or will be distributed to the county board of education. The state tax commissioner then shall provide the state board, by the fifteenth day of January of each year, a certified listing of those counties in which an adjustment pursuant to this section shall be made, together with the amount of revenue which will be available to each county board in the ensuing fiscal year as a result of contribution or payment in lieu of taxes.

(d) Total basic state aid to the county shall be the computed state share of basic foundation support. After such computation is completed, the state board shall immediately certify to each county board the amount of state aid allocated to the county for that fiscal year, subject to any qualifying provisions of this article.

Supreme Court, U.S.
FILED
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No. 97-1981

In the Supreme Court of the United States

OCTOBER TERM, 1997

WEST VIRGINIA BOARD OF PUBLIC WORKS, ET AL.,
PETITIONERS

v.

CSX TRANSPORTATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. 11501 (1994 & Supp. I 1995), validly authorizes a federal court to enjoin state officials from collecting taxes that have been assessed in violation of the Act.

2. Whether the relief sought in this case is prospective.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1981

WEST VIRGINIA BOARD OF PUBLIC WORKS, ET AL., PETITIONERS

v.

CSX TRANSPORTATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 138 F.3d 537. The opinion of the district court (Pet. App. B1-B17) is reported at 997 F. Supp. 749.

JURISDICTION

The judgment of the court of appeals (Pet. App. A15) was entered on March 10, 1998. The petition for a writ of certiorari was filed on June 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) protects railroads from discriminatory tax assessments. Section 306(b)(1) of the Act provides in relevant part that "a State" or "authority acting for a State" may not "[a]ssess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property." 49 U.S.C. 11501(b)(1) (1994 & Supp. I 1995). Relief may granted "only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. 11501(c) (1994 & Supp. I 1995). A State or authority acting for a State also may not "[l]evy or collect a tax on an [unlawful] assessment." 49 U.S.C. 11501(b)(2) (1994 & Supp. I 1995). As a general matter, the Tax Injunction Act, 28 U.S.C. 1341, prohibits a federal district court from enjoining the assessment or collection of state taxes when there is a "plain, speedy and efficient" state law remedy. "Notwithstanding section 1341 of title 28," however, a federal district court has jurisdiction "to prevent a violation of" the 4-R Act. 49 U.S.C. 11501(c) (1994 & Supp. I 1995).

In December 1995, the West Virginia Board of Public Works (Board) assessed taxes for the 1996 tax year on the property of two raiload companies—CSX Transportation, Inc. and Nicholas, Fayette and

Greenbrier Railroad Company (respondents). Pet. App. A3. In January 1996, those assessments became final. *Ibid.* After paying one-half of their assessed taxes, respondents filed suit against the Board and its individual members (petitioners) in the United States District Court for the Southern District of West Virginia. *Id.* at A3-A4. Respondents alleged that petitioners had assessed their property at a rate in excess of that of other commercial and industrial property, in violation of Section 306 of the 4-R Act, 49 U.S.C. 11501 (1994 & Supp. I 1995). Pet. App. A4. Respondents sought an injunction preventing petitioners from collecting that portion of the total annual tax that violates the Act. *Ibid.*

The district court dismissed the complaint on Eleventh Amendment grounds. Pet. App. B1-B18. The court held that Congress did not have authority under Section 5 of the Fourteenth Amendment to enact the 4-R Act's ban on discriminatory taxation of rail property. *Id.* at B3-B6. The court therefore concluded that "the attempted abrogation of Eleventh Amendment immunity in the 4-R Act was ineffective." *Id.* at B6.

The court also ruled that respondents could not sue state officials under *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. B7-B17. The court reasoned that, because respondents' taxes had already been assessed, and because respondents sought a credit for their first-half payment, respondents were seeking retroactive relief that is barred by the Eleventh Amendment. *Id.* at B15-B16.

Respondents appealed and the United States intervened to defend the constitutionality of Section 306's authorization of prospective injunctive relief against individual officials acting on behalf of a State. The

United States also urged the court of appeals to refrain from deciding whether Congress had authority to subject a State to suit under Section 306 pursuant to Section 5 of the Fourteenth Amendment.

2. The court of appeals reversed and remanded. Pet. App. A1-A14. The court held that an injunction that seeks to prevent state officials from collecting taxes in the future is prospective and is therefore permissible under *Ex parte Young*. *Id.* at A7-A14. The court of appeals rejected petitioners' contention that such an order would be retroactive because the assessment had already been made. The court explained that "[r]egardless of when [petitioners] completed the tax assessment, the action that [respondents] seek to enjoin—the collection of illegal taxes—has not yet occurred." *Id.* at A13. The court concluded that the "injunction that [respondents] seek is thus precisely the type of relief contemplated by *Ex parte Young*." *Id.* at A13-A14.

The court of appeals held that "[t]he district court further erred in holding that the injunction was retrospective because it sought a refund or credit for 'a monetary loss.'" Pet. App. A11. The court explained that respondents "have not *lost* any money: the money allegedly illegally assessed is still safely in their pockets." *Id.* at A12. The court added that "no award of any money need be made from the state treasury. Instead, money which state officials would otherwise collect from [respondents], in violation of federal law, will be protected from collection." *Ibid.* Because an injunction prohibiting the individual Board members from collecting the contested taxes would provide respondents with full relief, the court of appeals did not reach the question whether Con-

gress could validly abrogate state immunity under Section 5 of the Fourteenth Amendment. *Id.* at A7.

ARGUMENT

1. Petitioners contend (Pet. 8) that the court of appeals' holding that respondents may sue to enjoin the collection of taxes that have been assessed in violation of the 4-R Act disregards the rule that federal courts may not enjoin the collection of taxes when there is an adequate state law remedy. That contention does not warrant review. As petitioners acknowledge (Pet. 8 n.3), they failed to raise that issue in the court of appeals. The court of appeals accordingly did not consider it. Because petitioners failed to raise the issue below, and the court of appeals did not address it, it is not properly presented here. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the decision below does not conflict with the rule upon which petitioners rely. The rule that a federal court may not enjoin the collection of taxes when there is an adequate state law remedy is based on judicially fashioned "principles of federalism and comity" (*National Private Truck Council* v. *Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995)), and therefore applies only when there is no contrary congressional directive. That rule has no application here, because Congress has expressly authorized federal courts to enjoin the collection of taxes that have been assessed in violation of the 4-R Act, without regard to the adequacy of state law remedies. The 4-R Act specifically provides that "[n]otwithstanding section 1341 of title 28"—the Act of Congress that prevents a federal court from enjoining the collection of taxes when there is an adequate state

remedy—a federal court has jurisdiction "to prevent a violation of" the 4-R Act. 49 U.S.C. 11501(c) (1994 & Supp. I 1995). The effect of that special jurisdictional provision is to displace the federal statute—and the principles of comity and federalism to which it gave effect—that would otherwise prevent a federal court from enjoining the collection of state taxes that have been assessed in violation of the 4-R Act.

This Court's decision in *Burlington Northern Rail Road* v. *Oklahoma Tax Commission*, 481 U.S. 454 (1987), is instructive on that point. In that case, the Court held that the 4-R Act gives federal courts authority to review alleged overvaluation of federal railroad property by state taxation authorities. *Id.* at 460-464. The Court rejected the contentions that "injunctive relief against state taxation [under Section 306] offends the principles of comity" and that "restrictions on valuation actions * * * are necessary in order to avoid 'an inevitable clog of federal dockets' and 'unreasonable delay of the state tax collection process.'" *Id.* at 464. The Court held that it was not "free to reconsider" Congress's policy considerations in enacting Section 306. *Ibid.*

Petitioners contend (Pet. 9 n.4) that Congress's intent to permit suits in federal court to enjoin the collection of state taxes without regard to the availability of state remedies may be ignored because the court of appeals in this case did not reach the question whether Congress had validly abrogated the State's Eleventh Amendment immunity. That contention is without merit. Whether or not the 4-R Act validly abrogates a State's immunity from suit, it authorizes a suit against individual state officials "to prevent a violation of" the Act. 49 U.S.C. 11501(c) (1994 & Supp. I 1995). Under the doctrine of *Ex parte*

Young, 209 U.S. 123 (1908), such a suit for prospective injunctive relief does not implicate the Eleventh Amendment. And, under the express terms of the 4-R Act, such a suit may proceed without regard to the general rule that a federal court may not enjoin the collection of taxes when there is an adequate state remedy. 49 U.S.C. 11501(c) (1994 & Supp. I 1995). Thus, while principles of federalism and comity ordinarily preclude a federal court from enjoining the collection of taxes when there is an adequate state remedy, those principles are inapplicable here.

2. Petitioners also contend (Pet. 10-12) that the court of appeals' decision allows respondents to obtain retroactive monetary relief against the State in violation of the Eleventh Amendment. That contention is without merit and does not warrant review. As the court of appeals noted, respondents seek to enjoin the collection of money that "is still safely in their pockets" and that has not entered the state treasury. Pet. App. A12. Such relief is clearly prospective within the meaning of *Ex parte Young*.

Petitioners contend (Pet. 10-11) that such relief is retroactive here because the challenged assessment had already been made by the time respondents filed suit. The critical point, however, is that petitioners are continuing to use the assessment as the basis for collecting taxes. If, as respondents allege, the assessment violates the 4-R Act, petitioners' continuing use of that assessment as a basis for collecting taxes also violates federal law. 49 U.S.C. 11501(b)(2) (1994 & Supp. I 1994) (state authority may not collect a tax on an assessment that violates the Act). Respondents' suit to enjoin that alleged continuing violation of federal law fits squarely within the rationale of *Ex parte Young*. See *Green* v. *Mansour*, 474 U.S. 64, 68

(1985) (*Young* authorizes a federal court to grant prospective injunctive relief "to prevent a continuing violation of federal law"). As the court of appeals explained, "[r]egardless of when [petitioners] completed the tax assessment, the action that [respondents] seek to enjoin—the collection of illegal taxes—has not yet occurred," and the "injunction that [respondents] seek is thus precisely the type of relief contemplated by *Ex parte Young*." Pet. App. A13-A14.

Petitioners also contend (Pet. 11-12) that the relief sought by respondents is impermissibly retroactive because respondents not only seek to prevent an allegedly excessive second-half payment, but also seek a credit for their allegedly excessive first-half payment. When respondents made their first-half payment, however, petitioners had not yet released the information regarding assessments of other commercial and industrial property that was necessary to make out a claim of discrimination under the 4-R Act (Pet. App. A3-A4), and petitioners have not suggested that the issue arising from that feature of the case is one of recurring importance. In any event, the court of appeals in this case determined that respondents do not seek a credit for their first half payment, but instead seek an injunction against collection of that portion of the total annual tax that violates federal law. *Id.* at A11-A12. That portion remains unpaid by respondents, and accordingly no payment from the state treasury is necessary to afford respondents relief. So viewed, the relief sought by respondents is prospective within the meaning of *Ex parte Young*. See *Edelman* v. *Jordan*, 415 U.S. 651, 667 (1974) ("[T]he difference between the type of relief barred by the Eleventh Amendment and that permitted under

Ex parte Young will not in many instances be that between day and night.").

Finally, petitioners contend (Pet. 12) that the injunction sought by respondents would have a substantial adverse impact on the state treasury. As this Court has held, however, "relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986). Such an effect "is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Edelman*, 415 U.S. at 668.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1998

NO. 97-1981

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, *et al.*
Petitioners,

v.

CSX TRANSPORTATION, INCORPORATED; *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents restate the Questions Presented as follows:

1. Does the Ex parte Young exception to the Eleventh Amendment give a federal court the power to enjoin a State from collecting taxes from a railroad company under a statute expressly waiving the provisions of the Tax Injunction Act?

2. For purposes of Ex parte Young doctrine, is a federal court awarding prospective or retroactive relief when it enjoins a State from collecting taxes that it has already assessed, but that have never been paid or distributed to local jurisdictions?

PARTIES TO THE PROCEEDINGS

All parties were correctly listed in the Petition.

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation. CSX Transportation, Inc.'s non-wholly owned subsidiaries are:

Akron Union Passenger Depot Company
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road Extension Company
Beaver Street Tower Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Distribution Services, Inc.
Energy Dominion
Gemetal Distribution Services, Inc.
Georgetown Potomac Company
Harbour Associates
Helm-Atlantic Associates, L.P.
High Point, Thomasville & Denton Railroad Company
Home Avenue Railroad Company
Independent Rail Services, Inc.
Indiana Rail Road Company
Lakefront Dock and Railroad Terminal Company
Mahoning State Line Railroad Company
North Charleston Terminal Company
One James Center Associates

Richmond Center Associates
Richmond Center Associates II
Savannah Harbor Resources Developers, LLC
Savannah Harbor Venture Partners, LLC
SHRD, Inc.
Unified Services, Inc.
Washington Harbour Associates Limited Partnership
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

Nicholas, Fayette & Greenbrier Railroad Company was a corporation which was dissolved on January 2, 1997. Before dissolution it was 50% owned by CSX Transportation, Inc., which is a wholly owned subsidiary of CSX Corporation, and 50% owned by Consolidated Rail Corporation, a wholly-owned subsidiary of Conrail, Inc. On dissolution, the assets were split between the owners in the percentages stated above. Nicholas, Fayette & Greenbrier Railroad Company has no subsidiaries.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

No. 97-1981

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, GASTON CAPERTON, Governor; LARRIE BAILEY, State Treasurer; GLEN B. GAINER, III, State Auditor; DARRELL V. McGRAW, JR., Attorney General; GUS DOUGLASS, Commissioner of Agriculture; HANK MAROCKIE, State Superintendent of Schools; and KEN HECHLER, Secretary of State,

Petitioners,

v.

CSX TRANSPORTATION, INCORPORATED; and NICHOLAS, FAYETTE & GREENBRIER RAILROAD COMPANY,

Respondents,

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinions below are adequately identified in the Petition, except that the opinion of the United States District Court for the Southern District of West Virginia, which is reprinted in Appendix B to the Petition, is reported at 997 F.Supp. 749 (S.D.W.V. 1997).

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition, except that the Petition fails to note that the decision of the United States of Appeals for the Fourth Circuit was entered on March 10, 1998.

STATUTORY PROVISION INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. § 11501. *See* Petition, pp.2-3. Sections 306(1)(a) and (b), the specific provisions applicable in this case, prohibit a state, a political subdivision of a state, or any governmental entity or person acting on behalf of such state or subdivision, from assessing, levying, or collecting ad valorem taxes on rail transportation property based on an assessed value that has a higher ratio to the true market value of the rail transportation property than the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property. According to Section 306(2)(c), no relief may be granted unless the ratio of assessed value to true market value of the rail transportation property is at least 5% greater than the ratio of assessed value to true market value of other commercial and industrial property.

STATEMENT OF THE CASE

The Respondents amend and expand upon the Petitioners' Statement of the Case as follows.

Respondents CSX Transportation, Inc. and Nicholas, Fayette & Greenbrier Railroad Co. (referred to collectively as

"the Railroads") brought this action to challenge their ad valorem tax assessments for the 1996 tax year in West Virginia, requesting injunctive and declaratory relief pursuant to Sections 306(1)(a) and (b). As defendants, the Railroads named the Board of Public Works of the State of West Virginia and its individual members: Gaston Caperton, III, Governor; Larrie Bailey, State Treasurer; Glen B. Gainer, III, State Auditor; Darrell McGraw, Attorney General; Gus Douglass, Commissioner of Agriculture; Ken Hechler, Secretary of State; and Hank Marockie, State Superintendent of Schools (referred to collectively as "the Board").

The Railroads alleged that the Board assessed their property at a ratio of assessed value to true market value more than five percent greater than the ratio of assessed value to true market value at which other commercial and industrial property was assessed for the 1996 tax year, in violation of Sections 306(1)(a) and (b). The Railroads further alleged that the Board and its members were attempting to collect tax payments from the Railroads in violation of the Act. This was the same type of discriminatory taxation challenged in a previous action filed by the Railroads concerning the 1993 tax year, in which the Fourth Circuit found that the Board had assessed the Railroads discriminatorily. See CSX Transportation, Inc. v. Board of Public Works, 95 F.3d 318 (4th Cir. 1996).

Under West Virginia law, the Board assessed the Railroads' property for ad valorem tax purposes at 60% of its full market value.[1] The Board sent notices of assessment dated December 20, 1995, to the Railroads. Because the

[1] The Railroads did not challenge the Board's valuation of their property in this case.

Railroads did not administratively challenge the values contained in those assessments, the assessments became final in January of 1996.

It is the duty of the State Auditor to collect ad valorem taxes paid by public service companies, including railroads, and then to distribute those taxes to the counties in which the companies have property, with the exception of three-eighths of one percent of the total, which is paid into the state treasury for administrative costs. Therefore, other than the small amount reserved for state administrative costs, all of the tax proceeds at issue in this case are local funds, not state funds.

The first payment of the Railroads' taxes was due by September 1, 1996, the second payment was due by March 1, 1997, and all unpaid taxes became delinquent on April 1, 1997. The Railroads filed this case in October 1996, after they had made the first installment payment of their taxes for the 1996 tax year. In this case, the Railroads requested that the collection of the disputed portion of their taxes, approximately 7% of the total amount due, be enjoined from their second payment.

Because the Railroads' claim in this case was based not on an alleged overassessment of their property, but rather on the underassessment of locally assessed commercial and industrial property in West Virginia, the Railroads were dependent on data in the possession of the West Virginia Department of Tax and Revenue in order to prove their claim. The Department published its own sales assessment ratio study for the 1996 tax year in January of 1997, one full year after the Railroads' assessments became final and three months after the Railroads filed their complaint. At the same time, the Department furnished the Railroads with a data set which enabled the Railroads to make their own analysis of the ratio of assessed

value to true market value for locally assessed commercial and industrial property in West Virginia for the 1996 tax year.

The Railroads' expert statistician analyzed these data and determined that the actual level of assessment of commercial and industrial property in West Virginia for the 1996 tax year was no greater than 56% (which is approximately 7% lower than the Railroads' assessment ratio of 60%). Based on this evidence, the Railroads filed a Motion for Preliminary Injunction in February of 1997 asking the district court to restrain and enjoin the Board and its members from collecting or distributing to local jurisdictions the discriminatory portion of the taxes from the Railroads' second installment payment of their 1996 taxes, which was due in March. The timing of the motion was governed by the Railroads' receipt of the necessary data in February.

The Board filed a Motion for Summary Judgment (which the court and the parties agreed should be denominated a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure), which the district court granted on February 25, 1997. The court held that, under the decision of this Court in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), Congress did not have the power to abrogate Eleventh Amendment immunity in Section 306, because Section 306 had been enacted pursuant to the Commerce Clause rather than § 5 of the Fourteenth Amendment. In addition, the district court ruled that the Railroads were not entitled to prospective injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). This ruling was based on the finality of the Railroads' assessments, even though the state officials named as defendants had not yet collected or distributed to local jurisdictions the Railroads' second tax payment. The district court dismissed the case and denied the Railroads' motion for preliminary injunction as moot. The district court also rejected

the Railroads' claim that they could cure any alleged jurisdictional defect by amending their complaint to name the counties as defendants.

The Fourth Circuit reversed this decision, holding that because the action the Railroads sought to enjoin -- the collection of illegal taxes -- has not yet occurred, the injunction sought by the Railroads was precisely the type of relief contemplated by *Ex parte Young*. Appendix A to the Petition, pp. A-14-15. The Fourth Circuit further held, in agreement with the arguments made by the United States as intervenor, that because full relief could be granted to the Railroads under *Ex parte Young*, there was no need to decide whether the abrogation of state sovereign immunity in Section 306 was constitutionally valid.

The Railroads have not yet paid the disputed portion of the taxes at issue in this case.[2] According to West Virginia law, the State Auditor is required to certify to the Board and the counties the amounts of any delinquent taxes of public service corporations. It is then the duty of the Attorney General to collect any delinquent taxes. Therefore, even though almost all of the tax dollars at issue in this case are local funds, it is state officers who collect and distribute those funds.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. The Railroads respectfully submit that this Petition should be denied.

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[2] They paid the remainder of their second installment by March 1, 1997, withholding only the discriminatory portion, 7% of the total.

1. No Special or Important Reasons Exist for Granting the Writ

a. The Board's Comity Argument Has No Legal Basis

The Board makes two arguments why this Court should accept this case and reverse the ruling of the United States Court of Appeals for the Fourth Circuit, neither of which raise any serious or important issues. The first argument, which is based on notions of comity, is being presented here for the first time, without either of the courts below having had an opportunity to address it. As this Court has repeatedly held, "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Department of Corrections v. Yeskey*, _ U.S. _, 66 USLW 4481, 4483 (1998), quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

In *Yeskey*, the newly raised issue went to the heart of subject matter jurisdiction: whether application of the Americans with Disabilities Act of 1990 to state prisons was a constitutional exercise of Congress' power under either the Commerce Clause or § 5 of the Fourteenth Amendment. In contrast, the argument made by the Board here rests on the doctrine of comity, which is not truly a jurisdictional issue at all. This case does not present any compelling reason for this Court to overcome its traditional reluctance to address newly raised issues that were not considered by the Court of Appeals.

In addition, the Board's argument depends in its entirety on ignoring the express terms of Section 306, as well as a directly relevant decision in which this Court already rejected the same

argument being made here.[3] According to the Board, *Ex parte Young* relief cannot be used to enjoin state officers from collecting state taxes because of the prohibition of the Tax Injunction Act, 28 U.S.C. § 1341. It is astonishing that the Board can make this argument without ever mentioning that Section 306 contains an express waiver of 28 U.S.C. § 1341. Section 306(2) [49 U.S.C. § 11501(c)] states that relief may be granted under Section 306 "*notwithstanding section 1341 of title 28* and without regard to the amount in controversy or citizenship of the parties." [Emphasis added]. Although this subsection is quoted in the initial pages of the Petition, that language is completely ignored in the Board's argument. The Board makes its entire argument without mentioning the one provision of the statute that is directly relevant (and contrary) to its argument.

The Board also fails to note that this Court has previously heard and decided this precise issue. In *Burlington Northern*, this Court unanimously rejected the same argument made by tax officials from the State of Oklahoma:

> Respondents contend that injunctive relief against state taxation offends the principles of comity. [Citation omitted.] The Court of Appeals found that its restrictions on valuation actions under § [11501] are necessary in order to avoid "an inevitable clog of federal dockets" and "unreasonable delay of the state tax collection process." [Citation omitted.] These are policy considerations which may have weighed heavily with legislators who considered the Act and

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[3] *Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454 (1987) ("*Burlington Northern*").

> its predecessors. It should go without saying that we are not free to reconsider them now.

481 U.S. at 464.

Because it completely ignores the relevant statutory language, the Board's comity argument is phrased in terms of judicial action rather than legislation action. According to the Board, this Court should accept this case in order to make sure that state tax collection "is not federalized by judicial fiat." Petition, p. 9.[4] In fact, the Petition reads as if there were no statute involved in this case at all. No one in this case, however, has ever challenged the validity of the substantive provisions of Section 306. The Board's comity argument therefore depends on disregarding the actual terms of Section 306, disregarding the policy decisions made by Congress in enacting Section 306, and disregarding a directly relevant decision of this Court interpreting Section 306. Because the argument has no basis in the law, it cannot present a serious or important issue which this Court needs to address.

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[4] The only plausible explanation for the Board's comity argument is that the Board may have confused the Tax Injunction Act with the Eleventh Amendment. According to the Board, "the Fourth Circuit assumed that the 4-R Act's abrogation was invalid in order to reach the *Ex parte Young* issue. Thus, the question here is the scope of federal courts' authority in the absence of the 4-R Act's abrogation of Eleventh Amendment immunity." Petition, pp. 9-10, n. 4. What the Fourth Circuit actually said was that it did not need to determine the Fourteenth Amendment issue "because *even assuming* that section 306 cannot be justified as an exercise of Section Five of the Fourteenth Amendment and therefore its purported abrogation of state sovereign immunity is invalid, *Ex parte Young* authorizes an injunction, without eliminating sovereign immunity, that will provide the railroads with complete relief." Appendix to Petition, p. A-7 [emphasis added]. The Fourth Circuit thus took the sovereign immunity issue out of the case, but said nothing that would imply that Section 306's waiver of the Tax Injunction Act was invalid.

b. The Relief Requested by the Railroads in This Case is Precisely the Type of Relief Contemplated by *Ex parte Young*

The Board's second argument simply complains that the Fourth Circuit misapplied the doctrine of *Ex parte Young*, and turns on factual arguments concerning where the line should be drawn between prospective and retroactive relief. At most, the Board argues that the Fourth Circuit misapplied a properly stated rule of law, which is insufficient grounds for granting a Petition under Rule 10.

According to the Board, the Fourth Circuit's decision "effectively provides *declaratory monetary* relief against the State." Petition, p. 10 [emphasis in original]. This argument implies two things that are untrue: first, that the Railroads are seeking a refund of taxes already paid; and second, that the tax funds involved are state funds, rather than local funds. The Fourth Circuit quite properly rejected the Board's tortuous arguments attempting to transform local funds into state funds and to transform an injunction against future collection of taxes that have not been paid into a refund from the state treasury.

The Board attempts to turn this simple issue into one of special importance by claiming that the Fourth Circuit's decision has improperly expanded the scope of the *Ex parte Young* doctrine. This is nonsense, however. As the Fourth Circuit pointed out, the Railroads have the money at issue in this case in their own pockets, and the Board wants to collect it from them. The Railroads have asked for an injunction to prevent this from happening because

it would violate federal law. This is about as straightforward an application of *Ex parte Young* as can be imagined.

It is also a straightforward application of Section 306, which calls for injunctive relief against the assessment, levy *or collection* of taxes that discriminate against railroads. In West Virginia, members of the Board are bound by state law to collect these taxes from the Railroads, and to distribute them to local jurisdictions. The Railroads have asked for a prospective injunction against that collection. This is precisely the type of relief contemplated by Section 306, as well as by the doctrine of *Ex parte Young*. There is no overreaching or expansion of remedies being sought in this case, as the Fourth Circuit recognized. Because the Fourth Circuit's decision does nothing to expand or modify the *Ex parte Young* doctrine, there is no compelling reason for this Court to review this case.

2. There is No Conflict in the Circuits

The Board has not even attempted to argue that there is a conflict in this case, because there is none. The same issues presented to the Fourth Circuit in this case, however, have also been brought before the United States Courts of Appeals for the Third and Ninth Circuits. *See*, *Oregon Short Line R.R. Co. v. Department of Revenue*, 139 F.3d 1259 (9th Cir. 1998); *Wheeling & Lake Erie Ry. Co. v. Public Utility Commission*, 141 F.3d 88 (3d Cir. 1998) (petition for rehearing pending). In those cases, unlike in the case below, the courts chose to address the issue of whether the abrogation of state sovereign immunity in Section 306 was a proper exercise of congressional authority under § 5 of the Fourteenth

Amendment. In both cases, the courts held that Congress did properly abrogate state sovereign immunity in Section 306. Therefore, not only is there no conflict between the Fourth Circuit and the other circuits, but the other courts that have ruled on this issue have actually gone further than the Fourth Circuit did in this case. There is simply no reason why this Court should accept this case or address these issues at this time.

CONCLUSION

Neither issue raised in the Petition merits review by this Court. The comity issue is raised here for the first time, and rests entirely on a misreading of Section 306. The second issue is simply a factual argument over how to apply the *Ex parte Young* doctrine. The Fourth Circuit's decision on this point did nothing to expand or modify the doctrine, and therefore presents no new controversy for this Court to consider. The Petition does not present any ground for granting certiorari within the meaning of Rule 10 of this Court and should be denied.

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August 7, 1998

(4)

No. 97-1981

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, *et al.*
Petitioners,

v.

CSX TRANSPORTATION, INCORPORATED; *et al.*
Respondents.

Appeal from the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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No. 97-1981

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, GASTON CAPERTON, Governor; LARRIE BAILEY, State Treasurer; GLEN B. GAINER, III, State Auditor; DARRELL V. McGRAW, JR., Attorney General; GUS DOUGLASS, Commissioner of Agriculture; HANK MAROCKIE, State Superintendent of Schools; and KEN HECHLER, Secretary of State,

Petitioners,

v.

CSX TRANSPORTATION, INCORPORATED; NICHOLAS, FAYETTE AND GREENBRIER RAILROAD COMPANY,

Respondents.

Appeal from the United States Court
of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

The arguments of the Respondents do not negate the fact that the decision below is a novel expansion of the Ex parte Young, 209 U.S. 123 (1908), doctrine beyond the permissible bounds of this Court's jurisprudence.

I. This Court Should Grant the Petition Because the Fourth Circuit's Decision Impermissibly Expands the Ex parte Young Exception Beyond this Court's Jurisprudence.

A. The Fourth Circuit's decision ignores the fact that state taxation is a special sovereignty interest.

To reach the issue of the possible application of the Ex parte Young exception to sovereign immunity, the Fourth Circuit had to first assume that the abrogation of immunity in the 4-R Act was invalid. The Board has not confused the Tax Injunction Act with the Eleventh Amendment.[1] The Railroads have made the same mistake the Fourth Circuit made. The Railroads and the Fourth Circuit assume that the Tax Injunction Act is the only bulwark against federal interference with State taxation. As this Court recognized, the Tax Injunction Act is "but a partial codification of the federal reluctance to interfere with [S]tate taxation." National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582, 590 (1995). Thus, to consider if an injunction would be appropriate, assuming there was prospective State action to enjoin, the Fourth Circuit should have considered the action being enjoined. The action sought to be enjoined in this case involves State taxation--a "special sovereignty" interest like the one in Idaho v. Coeur d'Alene Tribe of Idaho, __ U.S. __, 117 S. Ct. 2028 (1997).

The availability of Ex parte Young relief in a State taxation case was recently considered by the United States Court of Appeals for the Tenth Circuit. ANR Pipeline Co. v. Lafaver, Nos. 96-3259 and 96-3345, 1998 WL 406632 (10th Cir. Jul. 21, 1998).[2] Two natural gas pipelines, which under Kansas law are public utilities like railroads, sued State officials. The pipelines complained that

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[1] See Railroads' Opp. at n.4. Nor has the Board "completely ignored" that language of Section 306 regarding the Tax Injunction Act. Railroads' Opp. at 9. As was explained in the Petition, while it is true that the 4-R Act evinced Congressional intent to allow federal courts to enjoin State taxation in certain cases, the Fourth Circuit's decision below assumed that the 4-R Act's abrogation was invalid. See Pet. at n. 4. The question the Fourth Circuit considered was the scope of federal courts' authority over State taxation of railroads absent the 4-R Act's abrogation of Eleventh Amendment immunity.

[2] This case was decided after the Petition was filed.

they did not receive the same "dramatic tax break" the railroads did under the 4-R Act. Id. at *2. In addressing the pipelines' claims for relief against the Kansas officials, the Tenth Circuit reached a different result than the Fourth Circuit's decision below.[3] The Tenth Circuit held that even the portions of the pipelines' requests for relief which were prospective and injunctive could not be granted because of this Court's decisions in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and Coeur d'Alene Tribe, supra. Relying on this Court's decision in Coeur d'Alene Tribe, the Tenth Circuit considered the "crucial question" in deciding whether Ex parte Young relief was available against the State to be whether a State's power to assess and levy personal property taxes "'implicates special sovereignty interests.'" ANR Pipeline at *14 quoting Coeur d'Alene Tribe, ___ U.S. at ___, 117 S.Ct. at 2040. The Tenth Circuit held that State taxation was just such a special sovereignty interest, and no Ex parte Young relief was available.

Unless the Ex parte Young exception applies to this case, the State's Eleventh Amendment immunity applies. See Coeur d'Alene Tribe, ___ U.S. at ___, 117 S.Ct. at 2040. Eleventh Amendment immunity is jurisdictional. See Seminole Tribe, 517 U.S. at 76 (where a suit is barred by the Eleventh Amendment, it must be dismissed for lack of jurisdiction).

B. The Fourth Circuit's decision impermissibly provides retroactive monetary relief against a State.

The Railroads mistakenly assert in their Brief in Opposition that they were dependent on data in the possession of the West Virginia Department of Tax and Revenue in order to prove their claim.[4] The lack of this data, according to the Railroads, is to

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[3] The Tenth Circuit differs from the instant case in that it did not consider the availability of Ex parte Young relief in a case brought under the 4-R Act, but rather in a case in which other public utilities were arguing that they should receive the same drastic reduction in their taxes that railroads received because of the 4-R Act. However, in effect, the ANR Pipeline decision and the Fourth Circuit's decision do conflict in their results both with regard to whether Ex parte Young relief is available in the State taxation context after Coeur d'Alene Tribe and what constitutes retroactive relief in traditional Ex parte Young jurisprudence.

[4] This error is echoed in the Solicitor General's Brief in Opposition. Fed. Opp. at 8.

blame for the fact that the Railroads did not seek a preliminary injunction for the first one-half payment.[5] This assertion and the implication that it was the State's action (or inaction) which prevented the Railroads from prospectively seeking an injunction are false. The time period for the sales at issue was January 1, 1995, to December 31, 1995, and the information that the Railroads claim they could not get until the State issued its sales assessment ratio study was in fact available from the counties all along.

The Railroads also mistakenly assert in their Brief in Opposition that the Fourth Circuit "quite properly rejected the Board's tortuous arguments attempting to transform local funds into [S]tate funds." Railroads' Opp. at 10. This is a complete misreading of the Fourth Circuit's decision. The Fourth Circuit made no determination that the funds involved were local funds rather than State funds. In fact, the Fourth Circuit's entire discussion of the requested Ex parte Young relief assumes that the funds involved are State funds.[6] See, e.g., App. to Pet. A-12.

Neither of the above-identified assertions formed a basis for the Fourth Circuit's holding that prospective injunctive relief was available. And, since these assertions are not true, they offer no possible support for the Fourth Circuit's holding that the State's officials may be enjoined regardless of when the State defendants completed the tax assessment as long as collection had not yet occurred. This holding creates an exception to sovereign immunity which will effectively negate the Eleventh Amendment in the area of State taxation since collection always lags assessment. The Fourth Circuit's holding is an impermissible expansion of the Ex parte Young doctrine and, with regard to the first one-half

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[5] The lack of this data did not prevent the Railroads from filing suit however. The Railroads filed suit in October 1996, after its first one-half payment was paid in full, but three months before the State published its sales assessment ratio study and gave the underlying data to the Railroads.

[6] The Fourth Circuit correctly assumed that the funds at issue were State funds and did not examine whether there would be a different result if the funds were actually local funds. The Tenth Circuit in ANR Pipeline found that it need not determine whether the funds at issue in that case were State or local, despite the pipelines' vehement argument that the funds were local, because under Coeur d'Alene Tribe the proper inquiry is whether the requested relief is the functional equivalent of legal relief that would be prohibited by the Eleventh Amendment. ANR Pipeline at n.17.

payment, is erroneous since collection of that payment had occurred. Contrary to the Railroads' argument and the Fourth Circuit's decision, the Railroads' tax money for their first one-half payment is not still in their pockets. The Tenth Circuit in ANR Pipeline, in contrast to the Fourth Circuit's decision below, did not consider the question of whether the taxes at issue had been collected because the pipelines were requesting that the federal court compel the State to "recertify" past years' tax assessments, i.e., retroactive relief. ANR Pipeline at *11. The pipelines in ANR Pipeline, like the Railroads in this case, were seeking to rectify past assessments. The Railroads' focus on collection does not negate the fact that a change in collection affects the prior assessment.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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